JUDICIAL PROCESS IN THE PRIMARY COURTS OF KENYA

A Thesis Submitted to the University of London in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy

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Abstract

The objective of this thesis is to understand the judicial process in the primary courts of Kenya. The first chapter is a synthetic essay which explains how I originally framed the questions to be asked, how I came to change those questions, how I conducted the research, and how the succeeding chapters were written. The second chapter presents my research method, and seeks to justify it. I then offer an exposition of the judicial system of Kenya, and turn to an analysis of cases handled by the primary courts of that system. I place the analysis of specific cases in perspective by means of a statistical study of behavior in the primary courts. Finally, I offer comparative data on judicial process in the appellate hierarchy, and on the dispute process outside of the official court structure.

In the third chapter, I build upon this exposition with an attempt to construct a theory of the dispute process which will explain what I have observed in the institutions of Kenya, as well as what has been described for dispute processes elsewhere. After locating my endeavor within the traditions, and contemporary literature, of legal and social scientific scholarship, I offer two theories. The first, a microsocial theory, explains process in dispute institutions (of which the primary courts of Kenya are an example) in terms of the structure of those institutions, using such variables as specialization, differentiation, and bureaucratization. The second, a macrosocial theory, explains the variety of dispute institutions we may expect to find in a society such as Kenya, and offers some tentative predictions about the future of those institutions.

Chapter four contains a comprehensive bibliography of published and unpublished materials concerning the customary law of Kenya. The appendix consists of published articles and reviews on African law and the social theory of law.

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Chapter 1. Introduction

I. Chronology

The work contained in this thesis has all been done since my registration as a candidate for the Ph.D. in October 1965. Research was conducted during my two years' residence at the University (1965-67), and during a year of field work in Kenya (1967-68). (During the first period I was the recipient of a Marshall Scholarship, and during the second, of a Foreign Area Fellowship. I am extremely grateful to the Marshall Aid Commemoration Commission and the Foreign Area Fellowship Program for their support.) The reason that the writing itself has taken so many years to complete is that I entered full time law teaching when I returned to the United States in the fall of 1968. Because I have been writing over an extended period, my theoretical focus has continued to develop, and thus to change. This section of the introduction describes how the different parts of the thesis came to be written; the remainder shows how each contributes to an understanding of judicial process in the primary courts of Kenya.

The original title of my thesis was "The law of civil wrongs in Kenya." I therefore devoted my two years in residence to collecting materials on the English and other colonial law, both

statutory and decisional, received by Kenya and later modified, and on the customary laws of the several tribes. On the basis of the latter I drafted restatements of the customary law of wrongs for most of the major tribes (see Chapter II, Part I, infra; this chapter consists of my article "Case Method Research on the Customary Laws of Wrongs in Kenya," and I will refer to it hereafter by the short form, Method: I).

I spent the academic year 1967-68 in Kenya, engaged in fieldwork directed toward ascertaining the substantive customary laws of civil wrongs. For reasons explained below (Introduction: III.A) I chose to look for those laws in the cases decided in the primary courts. I therefore collected and analyzed more than four thousand cases drawn from more than forty courts, as well as case materials on appellate review and extra-judicial institutions.

The following year, when I returned to the United States and began to teach, I compiled a comprehensive bibliography of all the materials I had collected for the purpose of studying the customary laws of wrongs in Kenya, which is included in Chapter IV of this thesis (hereafter referred to by the short form Sources; the compilation was published as "A Bibliography of the Customary Laws of Kenya (with special reference to the laws of wrongs)," VI(2) East African Law Journal 78 (1970); an earlier version will be found in 2 African Law Studies 1 (1969)). Using those materials,

and the cases I had recorded in Kenya, I wrote an essay describing how primary courts, appellate courts, and extra-judicial institutions in Kenya handle cases involving civil wrongs (Method, published in V(4) East African Law Journal 247 (1969), VI(1) East African Law Journal 20 (1970); an abridged version was published as "Customary Laws of Wrongs in Kenya: an essay in research method," 17 American Journal of Comparative Law (1969)). In the course of analyzing these cases as a source of substantive rules, I concluded that the procedures by which they were heard and decided were equally relevant for an understanding of how the several institutions operated, and perhaps even more important. I therefore asked to be allowed to amend the title of my thesis to "Judicial process in the primary courts of Kenya," which request was granted.

This attempt to offer a concise but comprehensive description of the operation of the primary courts within the legal system of Kenya forced me to confront the difficult problem of developing concepts appropriate to legal behavior, and a theory capable of explaining it. I approached that task over the next several years through a series of critical reviews in which I sought to define my own approach by reacting to those of others. (See the appendix to this thesis, hereafter referred to as Appendix, which contains reviews of: Ghai & McAuslan, Public Law and Political

Change in Kenya, in VII(2) East African Law Journal 180 (1971); Spalding, Hoover & Piper, One Nation, One Judiciary: the Lower Courts of Zambia, in 8 African Law Studies 97 (1973); Veitch, East African Cases on the Law of Torts, in 17 Journal of African Law 124 (1973) ; and Rheinstein, Marriage Stability, Divorce and the Law, in "Law Books and Books About Law," 26 Stanford Law Review 175 (1973).)

Finally, last fall, I completed such a theoretical framework, which constitutes Chapter III of this thesis ("A Comparative Theory of Dispute Institutions in Society," 8(2) Law and Society Review (Winter 1974, forthcoming); hereafter referred to by the short title Theory). That chapter includes the primary courts of Kenya within the concept of "dispute institutions" - an identifiable category of legal phenomena which also contains appellate courts and extra-judicial institutions. I construct a theory of dispute institutions, drawing upon the literature of sociology and anthropology. From this theory I derive an extensive set of propositions which help to explain judicial process in the primary courts of Kenya, as it changes over time, and as it differs from process in appellate hearings and extra-judicial institutions in Kenya, and in dispute institutions elsewhere. This chapter also offers some general explanations for the shape of dispute institutions in contemporary Kenya, and some speculations about the

future of those institutions.

This chronology brings me to the present; but I wish to stress that the work completed, which is contained in the thesis, forms the foundation for further research in and analysis of African legal institutions. An example will illustrate this. In each of my major articles I noted that behavior within a dispute institution is a product of interaction among judges and litigants (Method: IV; Theory: IV.A.2). An adequate theory of the dispute process must therefore include a description and explanation of litigant behavior. I am presently engaged in analyzing an extensive body of statistical data on litigation in Kenya, and simultaneously seeking to develop a theory of litigation, in an article tentatively entitled: "Why Go To Court: a historical and comparative study of patterns of local court use in Kenya."

II. Why Study Judicial Process in the Primary Courts of Kenya

A. Why Judicial Process

The dominant paradigm of contemporary western legal scholarship can roughly be defined as the identification, organization, criticism, and restatement of legal rules within a particular substantive field. The original objective of this thesis - a systematic record of the law of civil wrongs in Kenya - was guided by that paradigm. I pursued that objective for two years, reading the relevant Kenya legislation and cases of the High

Court and the Eastern Africa Court of Appeals. I also surveyed all the available ethnographic data on Kenya, published and unpublished. With that data I drafted restatements of the law of wrongs for most of the major tribes, which I intended to use as the basis for questioning ethnic law panels about their substantive rules, much in the manner of the Restatements of African Law Project (e.g., Cotran, 1968).

I first modified this plan when I discovered copies of some five thousand judgments of the Appeals Magistrates, collected by the former African Courts Officer, Mr. T.A. Watts, and filed in the Law Courts, Nairobi. Each judgment summarized the evidence and decision below, the grounds of appeal, and any additional evidence heard on appeal, and then presented a more or less reasoned opinion. My own background predisposed me to prefer this kind of data, for American legal education since the days of Langdell, and American scholarship under the influence of legal realism, have both emphasized a case-method approach to legal rules. Indeed, the Restatement of African Law Project is itself modelled, to some degree upon the restatements of the American Law Institute, which rely almost exclusively on decided cases as a source of rules. I had looked for case materials in London, but had discovered that the only cases reported from the primary courts were those found in the column "Kotini Wiki Hii,"

in the swahili weekly newspaper Baraza; beyond this I had to be satisfied with reconstructing the history of the Kenya judicial system in as much detail as possible. Therefore, once exposed to the judgments of the Appeals Magistrates collected in Nairobi, I turned immediately to the complete case files of the African Courts and the Appeals Magistrates Courts.

I was fortunate in being granted permission to examine these case files, and to borrow them while I made notes. I visited some forty courts throughout Kenya, and obtained records of more than four thousand cases (see Sources). But although I changed my method of research, preferring to analyze cases rather than interview elders, my ultimate objective remained constant - the ascertainment of rules. In fact, I justified the methodological shift on the ground that case analysis provided a more specific, comprehensive, accurate, and contemporary portrayal of those rules (Method: I). I pursued that objective when I returned from the field by using the cases to construct a restatement of the most complex body of law I had identified - the rules governing the liability of a man to pay customary compensation for impregnating an unmarried girl among the Kikuyu. This exercise confirmed for me the value of the case method as a source of rules, but it raised other doubts, for the substantive rules alone did not appear to offer an adequate account of the operation of the courts.

They undoubtedly played a significant role in framing the claim for relief, choosing the evidence to submit, and criticizing or justifying behavior. Yet rules were rarely made explicit in argumentation or discussed in judgment. And they seemed to be only one element among many others in a highly complex process.

This perception led me to reconsider whether I was asking the right questions about legal phenomena in Kenya. Rules have been the primary focus of scholarship on African law because they have been the primary focus of scholarship on western law. But what is the reason for the latter focus? And is it persuasive in the African context?

An abbreviated answer to the first of these enormously complicated questions is two-fold. Western scholarship rests upon an idealization of the legal system, according to which it functions in general harmony with substantive and procedural rules of law. Deviations from this model are handled by placing them in a residual category of "political" situations, to which legal rules do not apply and which legal scholarship, therefore, cannot explain (Theory: II.B.3). The model itself is studied by the method of legal science, which aims at the logical and aesthetic refinement of the system of rules, and the ethical criticism of those rules (Appendix: Review of Rheinstein).

This focus upon rules is sometimes appropriate, and sometimes

not. Rules may contribute importantly to the way in which society is ordered outside the courtroom (see, e.g., Holleman, 1973; Gluckman, 1973; and Appendix: Reply to Gluckman). And they may play a significant role within the court as well. In either case, a restatement of rules may be a valid generalization about legal phenomena. The limitation of the method of legal science is that it assumes that the rules provide adequate generalizations. But the jurisprudence of the last fifty years has weakened the hold of this assumption on legal scholarship; writers have repeatedly declared their "rule" scepticism and "fact" scepticism. And contemporaneous with this attack on rule oriented scholarship, an alternative tradition has developed as the social sciences - sociology, anthropology and political science - have begun to study legal phenomena. Unlike legal science, those disciplines do not make any assumptions about the significance of rules. Instead, that significance remains problematic, an empirical question of the extent to which members of a given society engage in the interpretation and application of rules.

As between these alternative approaches to legal phenomena, I have chosen that of social science, for the reasons stated at length below (Appendix: Review of Rheinstein). In my first article, therefore, I analyzed several cases in depth in order to determine how rules are in fact used in the primary courts of

Kenya (Method: III). I soon discovered that primary courts are fact-minded, concerned with concrete histories, not with rules - an observation that has since been confirmed by others (e.g., Fallers, 1969). This should hardly surprise us, for the expectation that rules will be of central importance in the judicial process derives from a "false comparison" of western appellate courts with African trial courts (van Velsen, 1969). This comparison was introduced into ethnographic analyses of African law by Gluckman's (1955) use of Cardozo (1921) and Fallers' (1969) use of Hart (1961) and Levi (1948) - all lawyers in the Anglo-American tradition focussing exclusively upon appellate tribunals. But an appellate court concerned with interpreting and changing rules offers a poor model for understanding a trial court devoted to the ascertainment of fact.

Western models are inappropriate for another reason as well. The substantive and procedural rules which do participate in adjudication in primary courts in Africa do not resemble the corpus juris of western legal systems. Prior cases do not constitute precedents for the future, and legislation is rare, if not unknown. The customary norms themselves tend to be vague, fairly abstract, often inconsistent, and unorganized; these characteristics limit the degree of constraint they can exert on the decision. Furthermore, those norms are rarely invoked expli-

citly by either litigants or judge. Explicit reference begins to be found only where the norm is novel, and has been reduced to writing, as in the Gusii case discussed below (Method: III; see also Gluckman, 1955: 58). As Michael Saltman (1971) has shown for Kenya, the mere existence of the Restatements may have the consequence that they will be invoked more often, as a written source of law, and thus become a more powerful generalization about behavior.

I concluded from this analysis that my study of legal phenomena in Kenya would have to go beyond substantive rules and include other elements of the judicial process. This was not a decision that rules are irrelevant, but rather a recognition that their significance must remain problematic - a variable to be studied empirically and explained theoretically (Theory: V.B.2.b). Nor is it a claim that judicial process exhausts the phenomena we ordinarily perceive as law (Theory: II.B). If norms do not fully explain the dispute process, they may perform a significant role outside dispute institutions; furthermore, the norms which perform that role may differ from the norms which influence the dispute process. The study of normative systems - which would include such questions as how they are created, when they are invoked, in whom they are internalized and to what degree - is therefore a fruitful endeavor in its own right. Equally, behavioral

regularities - Gluckman's praxis (1973), Holleman's non-contentious law (1973) - are not wholly explained either by norms or by dispute process, and therefore offer a third focus for investigation. The interaction of these three categories of phenomena may be held out as the ultimate aim of a social theory of law. But since it is clear that we cannot build such a theory all at once (Theory: II.A), the decision to isolate one of these intertwined strands should require no justification. I have chosen the dispute process for the reasons indicated below (Theory: II.B).

Having defined the boundaries of my subject, I then turned to the traditions of social theory for the general structure of the questions I wanted to ask: what patterns do we find in the way disputes are handled in Kenya, and how do we explain those patterns? The phenomenon I seek to understand can thus be demarcated as the behavior of persons within dispute institutions in Kenya (Theory: II.B.1). Legal scholars and social scientists have generally agreed that the most significant person within such an institution is the judge; and I, too, emphasize the behavior of the judge, under the awkward neologism of "intervener" (Theory: IV.A.3). More recently, however, social scientists have stressed the contributions of litigants to behavioral patterns within the institution, and have begun to study how litigants choose a forum in which to dispute, and what they do once they

get there. I recognize the importance of such behavior (Theory: IV.A.2), and have made a start at trying to describe it (Method: IV). Finally, the dispute institution does not operate in a vacuum, but interacts with the environing society. The characteristics of that society influence the institution directly, as well as the behavior of litigants in using it; and behavior within the institution in turn has consequences for the society (Theory: VI).

If my subject matter - the dispute process - lies outside the boundaries of traditional legal scholarship, so does my objective. Legal scholars generally offer descriptions of and prescriptions for behavior; the declared aim of social science is to explain (Appendix: Review of Rheinstein; Review of Spalding, et al.). One of the accepted meanings of explanation is the subsumption of concrete instances under general rules (Theory: III.A, B). I have sought to achieve this goal by the following steps. First, I have conducted intensive case studies of dispute processes in a variety of dispute institutions in Kenya, and have tried to discern regularities (Method: III, V, VI). In order to determine the causes of these regularities, I compared those institutions and processes with each other, and with examples from other societies (Theory: II.B.2, IV.B). This comparison required me to develop concepts which would be applicable across societies (Theory: III.B.2). It also demanded the construction of theories

that would identify possible causal links between institution and process (Theory: V), society and institution (Theory: VI). Finally, these theories must be tested by means of statistically significant populations, an operation that still largely remains to be done (Method: IV).

B. Why the Primary Courts?

Although the theory advanced in this thesis was developed through a comparison of a variety of institutions, and claims the power to explain dispute process in any institution, I have always been principally concerned to understand the primary courts of Kenya. This choice, too, requires some justification (Theory: II.B), for it also departs from both of the scholarly traditions upon which I draw. Legal scholarship in Africa, where it has been concerned with customary law, commonly shows a distinct preference for the higher appellate tribunals. Anthropological scholarship, by contrast, generally studies indigenous institutions outside the official court structure.

I would not wish to appear critical of either tradition; each is clearly necessary for a complete understanding of legal phenomena - legal scholarship seeks to understand the behavior of the state, anthropology investigates the behavior of the individual within the small community. But if we are interested in interaction between individual and national state - in the

demands which the individual makes upon the state, or in the constraints the state imposes upon the individual - the primary court becomes the critical arena. By contrast with the appellate hierarchy, the primary court is highly accessible to the citizens of Kenya, however access may be measured - geographically, or by cost, or in terms of social and cultural distance (Method: II, Theory: V.A.2). And this accessibility has been accompanied by high levels of use (Method: II, IV: see also Appendix: Review of Spalding, et al.; Review of Veitch). On the other hand, when compared with the tolerance accorded indigenous institutions, the primary courts have been subject to a substantial degree of state control. I have described in some detail the changes wrought in that institution since its creation out of traditional and western elements at the opening of the colonial era (Method: II, Theory: V.A). Indigenous institutions have also changed, but not as dramatically (except where they have died out through disuse); and much of the change has been a response to innovation in the primary courts (Method: VI; see also Collier, 1973; Fallers, 1969; Nicholson, 1973). Thus the focal point of tension between traditional and English methods of handling disputes in Kenya has been the primary court.

III. A Theory of the Judicial Process in the Primary Courts of Kenya

As social scientists have recently shown (e.g., Collier, 1973),

a court may fruitfully be viewed as a semi-autonomous social field (Moore, 1973). Because it is partly autonomous, we may legitimately isolate behavior within it for study. I therefore begin with a theory about judicial behavior, and then turn to the behavior of other significant participants, the litigants. But because the court is only partly autonomous, it is also necessary to understand how it is affected by, and affects, the larger society.

A. The Behavior of the Judge

I chose to concentrate on the behavior of the judge, under the generic name of intervener, and sought to explain that behavior as well as to describe it. In order to insure that my explanation did not collapse into tautology, I constructed a distinction, necessarily somewhat arbitrary, between the structure of the dispute institution - especially the role of the intervener - and the behavior which it is offered to explain - the dispute process (Theory: III.B.1).

I approached an analysis of institutional structure through a brief history of the primary courts (Method: II). Although this narrative was largely descriptive, I necessarily engaged in comparison across time; I became more explicitly comparative when I turned to the structure of other dispute institutions in Kenya: the appellate hierarchy which surmounts the primary courts

(Method: V), and extra-judicial institutions (Method: VI). Because a theory gains in power as it expands in generality (Theory: III.B.2), I extended my search for comparable institutions beyond the boundaries of Kenya (Theory: IV.B). But this level of generality requires the development of new concepts capable of comparing the structures of highly disparate institutions (Theory: II.A). For this purpose, I used the umbrella notion of structural differentiation, which encompasses the concepts of specialization, differentiation, and bureaucratization. I then operationalized these concepts (Theory: V.A), thereby creating a lengthy list of variables which allowed me to chart changes in the structure of the primary courts of Kenya over time, differences between these courts, the appellate hierarchy, and extra-judicial fora, and differences between each of those institutions and others outside Kenya.

Next, I analyzed judicial process in the primary courts of Kenya by means of case studies (Method: III), which suggested regularities in the way judges defined the cause of action, admitted and evaluated evidence, handled legal rules, assessed praise and blame, and imposed penalties. I compared this process with dispute processes in other institutions in Kenya through an analysis of cases as they proceeded up the appellate hierarchy (Method: V) and as they were handled out of court (Method: VI).

And again I looked at other societies in order to construct concepts of sufficient generality to comprehend the variety of disputes processes I found there (Theory: II.B.2). I then reviewed the literature of sociology and jurisprudence in a search for causal links between the structure of a dispute institution and its dispute proceds (Theory: V.B.). This led me to advance the following theory: as the structure of a dispute institution becomes more specialized, differentiated and bureaucratized, the dispute process within that institution is progressively rationalized, adapts to the functional needs of the institution, and grows more bureaucratic (Theory: V.B.1). I operationalized these latter concepts also (Theory: V.B.2), deriving a set of variables that allowed me to describe and explain changes in the judicial process in the primary courts over time, and differences in process between those courts and other dispute institutions in Kenya and elsewhere. The theory is stated in a form that I hope will facilitate statistical testing of the kind I began in Method: IV.

B. The Behavior of Litigants

Litigants are as important to the dispute process as is the intervener; indeed, it can be argued that they are more important (Theory: IV.A.2). My case studies of process in the primary and appellate courts and extra-judicial institutions of Kenya (Method:

III, V, VI) revealed patterns in the ways in which a litigant chooses his forum, frames his claim, selects and prepares his evidence and attacks that of his adversary, justifies his own actions and criticizes those of others, and responds to the decision. I made a preliminary effort to explore these patterns through the use of statistical data (Method: IV). But because I lacked a framework for analysis comparable to that provided by my theory of judicial behavior, this effort often appeared troubled by "abstracted empiricism" (Mills, 1959: chap. 3) - a making of connections without a clear sense of direction. To remedy that flaw, I am now working to develop a theory of litigant behavior which will permit a more sophisticated analysis.

C. The Primary Courts in Kenya Society

Theories of the behavior of judges and litigants tell us something about what occurs within a particular judicial institution. But we must also ask why a society such as Kenya has these institutions and not others, and further: What are the consequences for a society of having such institutions? Are there pressures for change, or constraints upon deliberate change? And what consequences should we expect from these changes?

Theories of dispute institutions in society - what I call macrosocial theory (Theory: VI) - are presently much less satisfactory than the microsocial theories offered above to explain

behavior within the institution itself. We are only beginning to realize that societies exert constraints upon their dispute institutions in different ways, and to different degrees. In all societies dispute institutions are connected to, and influenced by, other major social institutions (Theory: VI.A.1.a, V.B.1.a). Thus extra-judicial institutions in Kenya can to some degree be explained by the structure of traditional Kenya society (Method: VI); and the history of colonial society illuminates the structure of the contemporary judicial system (Method: II). But we may also find that in the latter situation the connections are more tenuous because of the greater autonomy of legal institutions in more developed societies. Societies also influence their dispute institutions through the mechanism of litigant choice (Theory: VI.A.1.b, V.B.1.b). Thus social structural, cultural, and personality variables affect the frequency of conflict, its subject matter, and the relationship of the parties among whom it occurs (Method: II, IV; Theory: II.B.1). These characteristics of conflict in a society in turn influence litigant choice among the available fora (Method: II, III, VI), which determines the number and kind of cases confronting the primary court.

The impact of such social variables upon dispute institutions tends to be most significant in relatively stable societies

evolving gradually over long time periods - e.g., pre-colonial Kenya. In societies experiencing rapid, abrupt change as a result of external forces - such as Kenya since the advent of colonial rule - social structural variables may be more significant as a constraint upon the government's deliberate efforts at social engineering (Theory: VI.A.3, VI.B.3). Thus we are helped to understand why primary courts depart from official substantive and procedural rules (Method: III), why appellate courts fail to control them (Method: V), and why extra-judicial institutions continue to perform important functions (Method: VI). Such an understanding is essential for the intelligent development of judicial institutions in Kenya. Equally important is some notion of the consequences to society of possessing particular institutions. Thus I have sought tentative answers to such questions as: what influence, if any, do dispute institutions have on each other - e.g., the primary courts on extra-judicial institutions in Kenya and vice versa (Theory: VI.A.2.a, VI.B.2.a); and what are the consequences of a change in the characteristics of dispute institutions in Kenya for the quality of social relations (Theory: VI.A.2.b., VI.B.2.b).

Finally, we may begin to draw the interconnections between these pieces of theory in the form of a model - a pictorial representation of dispute institutions in society which will help us

to ask the right questions about the future of the primary courts of Kenya (Theory: VI.C).

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Chapter 2. Case Method Research in the Customary Laws of Wrongs in Kenya

I. Introduction[1]

The literature on the customary laws of Kenya is probably more extensive than that for any other country in East or Central Africa. The Restatement of African law project has been able to compile a bibliography of approximately seven hundred entries touching on the subject.[2] In

1. Field research on which this paper is based was conducted under a fellowship granted by the Foreign Area Fellowship Programme, from September 1967 to November 1968. However, the conclusions, opinions, and other statements in this publication are mine and not necessarily those of the Fellowship Programme. I wish to express my deep gratitude to the many members of the Judicial Department of Kenya who greatly facilitated my research: members and staff of the District Magistrate's Courts, the staff of the High Court library in Nairobi, and especially Mr. T. A. Watts, Administrative Secretary to the High Court, whose generous assistance permitted me to accomplish a great deal of work in a relatively short time.

2. *Restatement of African Law Project, Draft Bibliography for East Africa* (Kenya, Somali Republic, Sudan, Tanganyika, Uganda, Zanzibar) (n.d.) (cyclostyled, 83 + iii pp.). See also Abel, "A Bibliography of the Customary Laws of Kenya (with special reference to the laws of wrongs)," II African Law Studies (1969).

reviewing this literature preparatory to embarking on fieldwork,[3] I found sufficient material concerning the larger tribes—Boran (Galla), Elgeyo, Embu, Gusii, Iteso, Kamba, Kikuyu, Kipsigis, Kuria, Luo, Luyia, Masai, Meru, Mijikenda, Nandi, Pokot, Samburu, Taita, and Turkana—to permit me to construct for each a broad working outline of the more limited field of customary wrongs. And yet the published descriptions I read seemed terribly lifeless. Charles Dundas, an early administrative officer in Kenya, wrote a detailed analysis of Kikuyu and Kamba customs which strikingly illustrates this characteristic. The following passage is typical:

> "In Ukamba, if a man strikes a corpse, he is liable for full blood money; in Kikuyu he must pay approximately half (but in Ndia one-third). The same payments are due if he should take any part in a fatal fight, although he may have inflicted only the slightest wounds, and in such cases he must observe the ordinary ceremonies required for purification."[4]

Do such statements in fact tell one anything about the nature or operation of a legal system? When would a man strike a corpse: in anger, in despair, contemptuously? Would it be the corpse of an enemy, a friend, a relative? What would the reaction of others be? How would the alleged compensation be claimed, and by whom, and in what forum? The second rule invites similar questions: under what circumstances might a fatal fight occur; what actions would be considered to constitute "taking part"? What is a slight wound? The rules offered by Dundas are so dehumanized as to be almost absurd. Indeed, some are absurd:

> "[The law of homicide does not consider the accused's state of mind.] So strict is this broad rule that Kikuyu elders have told me that if a man were seized by a lion, and his friend wishing to save him were to throw a spear, he would be liable for compensation if he inadvertently struck the man instead of the lion."[5]

My own legal syntheses, constructed upon such data, therefore consisted of totally disembodied propositions, mere abstracts of abstracts. I find in my notes a schedule of compensation among the Kikuyu for bodily injuries: for loss of an eye, amounts ranging from ten to sixty goats; for loss of a tooth, from one sheep to ten goats and a ram. These con-

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3. I did the preliminary work on this subject in London during the two years I was a Marshall Scholar, from September 1965 to September 1967. I would here like to thank Professor A. N. Allott and Mr. Eugene Cotran, of the African Law Section, School of Oriental and African Studies, for allowing me access to the files of the Restatement of African Law Project.

4. Dundas, "The Organization and Laws of Some Bantu Tribes in East Africa", 45 J. Roy. Anthrop. Inst. 234, 263–64 (1915).

5. *Ibid.*

flicting assertions cannot be reconciled by particularization to the circumstances in which the injury was inflicted because such information is simply not available anywhere in the vast body of ethnographic description.

I am increasingly convinced that the reason for these failings is that few, if any, of the numerous ethnographic accounts contain any descriptions of actual cases. Either investigators failed to observe or to inquire about cases,[6] or else they deleted all information about the actual controversies from their reports.[7] Instead, many appear to have proceeded by asking informants, believed to be especially knowledgeable about the customary law, to make conclusory statements about the consequences of a particular course of action.[8] This procedure seems inevitably to elicit rules empty of content, of which Dundas' writing is a particularly egregious, though not atypical, example. Anxious to avoid these pitfalls, I considered an alternative approach to fieldwork—the case method—suggested by my training in the common law tradition.[9] This technique appears to possess several distinct advantages for the study of customary law, which can best be demonstrated by contrasting the kinds of rules produced by the two methods.

These rules may be tested by two criteria: whether they adequately portray the full range of experience within the society; and whether they are distorted by bias in the investigator or the informant. Satisfaction of the first criterion may in turn be judged according to several subordinate standards, among which are:

1. *Specificity.* Statements by an informant will often be vague and general: "Our rule is that a murderer is killed". There are many reasons for this lack of specificity: ignorance of the detailed variations of a rule in different factual situations; inability to think about, or to express,

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6. See, e.g., Hamilton, "Some Notes on Native Laws and Customs," I E. Afr. Prot. L. Rep. 97 (1906); Leakey, "Some Notes on the Masai of Kenya Colony," 60 J. Roy. Anthrop. Inst. 185 (1930).

7. See, e.g., Kenyatta, *Facing Mount Kenya* (1938); P. Mayer, *Gusii Bridewealth Law and Custom* (1950); Ngala, *Nchi na Desturi za Wagiriama* (1949); Orchardson, *The Kipsigis* (1961); Othieno-Ochieng', *Luo Social System*, with a special analysis of marriage rituals (1968).

8. See, e.g., Bostock, *The Taita* (1950); Snell, *Nandi Customary Law* (1954).

9. I certainly claim no originality in the use of this method. Indeed, the most venerable guide to anthropological methodology emphasizes that the investigator must concentrate on eliciting concrete instances of reputed customs. Roy. Anthrop. Inst. of Great Britain and Ireland, *Notes and Queries on Anthropology* 36–37 (6th ed., 1951). But in view of the widespread agreement on the value of case materials, their neglect by legal researchers is that much more striking and unforgiveable.

the rule in terms of situational variables;[10] or simply response to an overbroad question, such as: "what is your rule for murder?" This last difficulty is not easily avoided. No outsider can be sufficiently familiar with a society to be able to formulate as a hypothetical problem every occasion on which the type of wrong might occur in that society. The alternative solution, using the elements of the wrong taken from another legal system—for instance, the English law of homicide—as the source for hypothetical questions, distorts the significant detail, lending the data a false specificity.[11] It is this lack of culturally significant detail which makes many reported rules absurd: certainly all "murderers" are not, in fact, killed. The case method avoids these dilemmas by deriving rules from disputes. Rules are thus specified by the factual details of a real controversy, so that each significant variable may be identified, and no fictitious variables are introduced by the interrogator's questions. Specificity no longer depends on the knowledge or abilities of the informant since the decision maker, the source of data, is forced to fashion a rule to meet the disputed issues, and need not know how variant situations would be resolved.

2. *Comprehensiveness.* If rule-directed interviews fail to uncover the details of any single rule, they are also inadequate to explore the full range of legal prescriptions governing a society. The experience of any individual is necessarily limited, and his memory imperfect. Consequently no informant, nor even any group of informants, can be expected to know all the rules of conduct.[12] Further, they are not likely to be able to give a

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10. See A. L. Epstein, "The Case Method in the Field of Law," in *The Craft of Social Anthropology* 205, 210 (Epstein ed. 1967):

> "In my own fieldwork among the Bemba, and later in the African urban courts of the Copperbelt, I found that court members could expound the points involved in a case they had just been hearing with great command and infinite patience, but they were much less at home in the discussion of hypothetical issues which I would sometimes have to put to them. This was not because they were unintelligent or lacking in legal insight and imagination, but because their mode of legal thinking was particular rather than abstract: the rules of law they expounded were not conceived as logical entities; they were rather embedded in a matrix of social relationships which alone gave them meaning."

Bohannan appears to be making a related point when he says: "Tiv have 'laws' but do not have 'law' . . . In Tivland there are *atindi* or 'rules', but they have not been especially organized for jural purposes." *Justice and Judgment among the Tiv* 57–58 (1957).

11. Cf. Roy. Anthrop. Inst., *op. cit. supra* note 9, at 36 (criticizing the use of questionnaires). But cf. Poirier, *Questionnaire d'ethnologie juridique appliqué à l'enquête de droit coutumier* (1963).

12. See Hall, "The Study of Native Court Records as a Method of Ethnological Inquiry," 11 Africa 412, 413 (1938) (example of rule discovered from study of cases which had not been reported by previous investigators); cf. Herskovits, "The Hypothetical Situation: A Technique of Field Research," 6 Southwestern J. Anthrop. 32, 36 (1950) (informants may omit vital information because they take for granted that everyone knows it).

spontaneous recitation of all the rules they do know. The investigator is then brought up against the dilemma suggested above, of his own incomplete knowledge of the society under scrutiny, and the danger of ethnocentric bias in the use of questions based on a model drawn from another society. The case method circumvents these difficulties by permitting an investigator, even one substantially ignorant of the scope of the indigenous legal system, to obtain as comprehensive a report as he desires merely by continuing the collecting of cases until repetition convinces him that all but the most aberrant situations have been identified. It is probably true for African societies, as Holmes has said of American,[13] that most, if not all, possible controversies occur within the history of a single generation.

3. *Representativeness.* Rule-directed inquiry appears to seek for broad principles rather than the unique example. As a result, the rules it produces acquire an undeserved façade of generality. But in fact an informant may have based his conclusory statement on a single, unrepresentative instance. Multiplying informants does not avoid the risk that all may in fact be relying on the same atypical situation. The danger is inherent in the method which fails to discover, and consequently to disclose, the factual experience underlying the asserted prescription. It may lead the investigator to accept unquestioningly a proposition which is absurd on its face. Goldschmidt, writing recently about Sebei law, asserts: "one informant indicated that the middle child of triplets *always* [my italics] is squeezed by his siblings and dies."[14] How many triplets could the informant have been familiar with?[15] Certainly not enough to justify the conclusory adjective "always". By contrast, when research focuses on actual cases it is immediately clear whether a stated rule is evidenced by numerous, mutually confirming, applications, or is merely the reflection of isolated, and therefore suspect, happenstance.

Not only must the rules be adequate—specific, comprehensive, representative—they must be the right rules. I have already suggested above

13. Holmes, "The Path of the Law," 10 Harv. L. Rev. 457, 458 (1897): "The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view." Cf. Hall, "Nyakyusa Law from Court Records," 2 Afr. Stud. 153 1953): "It would indeed have been surprising if there had been any aspect of Native law not covered by the Courts, since the annual average of civil cases heard over the years 1936–1940 has been 5,450."

14. Goldschmidt, *Sebei Law* 95 (1967).

15. Triplets occur statistically about once in every 5,800 births, see Guttmacher, *Pregnancy and Birth* 214 (rev. ed. 1962) (statistic for black Americans) or, among the 24,000 Sebei, no more than a handful of times a generation. In a society lacking mass communications the rule could not have been based on personal knowledge of more than one or two instances.

several ways in which the structure of an interview can condition the nature of the product:

1. *Asking the wrong questions.* Unless the investigator is willing to produce an incomplete record of the customary law he must model the questions he asks not on the indigenous social structure, which he knows incompletely or inaccurately, but on a legal system—real or analytic—with which he is familiar. The questions he then asks, for instance: "what happens when a son murders his mother?" may be meaningless in indigenous terms, and the informant will frequently answer: "that never happens." An investigator who refuses to accept such a reply may finally elicit a rule, but it will be a rule designed to fit the analytic system, not one derived from indigenous experience. "It never happens" is in fact a truer description. A study of cases will uncover the fact that it never happens and accept that fact as a highly significant element in the description of what actually does happen.

2. *Asking questions in the wrong way.* Just as the subject of a question may demand information about a course of conduct that has no social reality, so the form of a question will prefigure the way in which actual conduct is analyzed. An investigator may ask: "Is a man liable for abuse uttered when he is drunk?" and receive the reply: "no". He can only understand that reply in terms of the question, which was in turn drawn from an analytic system in which "intoxication" is a significant category. He will then derive a rule that intoxication is a defence in abuse cases. The informant may in fact be answering the question by reference to an indigenous category: there is no liability for abuse when it is part of a non-serious exchange of insults, and the fact that the defendant was drunk can only mean that he was at a drinking party, one example of such a non-serious occasion. The case method would use as its data instances of abuse, including drinking parties, from which the analyst would have a better chance of seeing those categories which are significant in indigenous terms.[16]

The informant may introduce further distortions, in addition to those discussed above.

1. *Bias against indigenous practices.* In any interview situation the subject is under pressure to give those answers he believes the investigator wishes to hear. These pressures are intensified where, as in contemporary Africa, the investigator is of a higher social status than the informant, and often of a different race. It is widely known that Europeans, and many educated Africans, condemn a practice like infanticide, disapprove of bridewealth payments, and disbelieve in witchcraft. An informant may

16. See Bohannan, *op. cit. supra* note 10, at 4–5.

conceal or misreport actual practices in order to win the investigator's approval, and perhaps also to protect those practices from change.[17] Decisions in actual disputes are, of course, just as subject to the pressures of modernization as is the testimony of informants. But use of such disputes as data insures that the investigator will be recording real changes in the customary law, and not just a façade of change erected to appease the perceived biases of the researcher.

2. *Bias in favour of traditional practices.* This is to some extent the obverse of the above danger. Instead of exaggerating the extent to which customary law has altered to meet modern conditions and new values, the informant may glorify the pre-colonial experience, refusing to admit that any change has occurred. The likelihood of such bias is often substantially increased by the choice of informant, for today only the older men in many communities retain any extensive knowledge of customary law. The use of actual cases eliminates this bias, since every rule may be specified chronologically by the date when the dispute occurred.

3. *Ideal rather than actual rules:* the is/ought distinction. The two biases already mentioned—modernity and traditionalism—can be generalized as a defect inherent in rule-directed inquiry: the possibility that replies may refer to ideal rules rather than actual behaviour, to what the law ought to be rather than what it is. Statements of ideal behaviour are certainly an important element in the culture of any group, but they are not law. To paraphrase Holmes[18] again, the prophecies of how disputes will be decided in fact, and nothing more pretentious, are what I mean by the law. Perhaps the most significant merit of the case method is its insistence upon concentrating on actual controversies without being misled by the prescriptions of ideal morality.

In view of the advantages claimed for the case method, why has it not been used more extensively? Fifty years ago, at the time Dundas was writing, an explanation might have been found in the prevailing legal philosophy, whether explicitly held by the investigator or adhered to unwittingly. "Legal absolutism"—the term is Jerome Frank's—denied to mere controversies any significant value as evidence of the law: "The decision of a court, determining a particular controversy . . . can in no sense be regarded in itself law, whether it be the doom of an ancient monarch, the decision of a popular court, or the judgment of a modern tribunal."[19] But today we are all more or less legal realists, accepting

17. See Herskovits, *supra* note 12, at 37; cf. Barnes, "Some Ethical Problems in Modern Fieldwork," 14 Brit. J. Sociol. 118, passim (1963). But see Roy. Anthrop. Inst., *op. cit. supra* note 9, at 29–30.
18. Holmes, *supra* note 13, at 461: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."
19. Beale, *Treatise on the Conflict of Laws* (1916) quoted in Frank, *Law and the Modern Mind* 53 (6th ed. 1949).

Holmes' emphasis on cases as the starting point of legal research. Significantly, it was the leading proponent of this school, Karl Llewellyn, who joined with an anthropologist, E. Adamson Hoebel, to execute the first broad study of customary law based entirely on what they called "trouble cases".[20]

That this approach was not immediately imitated is therefore probably due more to the practical difficulties it posed than to any jurisprudential aversion, for the case method places a far greater burden on the field-worker. An interviewer, once he identifies a co-operative, knowledgeable informant, can survey an entire legal system in the course of discussions occupying a few days. It is true, of course, that an equally comprehensive collection of cases may be obtained with little more difficulty from an informant.[21] But if reliance is not to be placed on the incomplete and warping memories of men then disputes must be recorded contemporaneously, which demands extended residence in the community, as well as considerable technical abilities.

The investigator cannot know in advance where, when, or by whom a dispute will be mediated. Even in those societies possessing formal agencies for settlement, adjudication is not conducted according to a predetermined calendar. But in many tribes the very identity of the participants in the settlement process depends on the relationship of the litigants and the circumstances of the controversy. The investigator can insure his presence at the discussions only by being in the vicinity, "on call" when the dispute first erupts. And then he must in addition be fluent in the vernacular or work through, or with the assistance of, interpreters who have that ability. Only the anthropologist has combined the dedication and patience required to observe actual disputes with the technical skills necessary to translate observation into understanding.[22]

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20. Llewellyn and Hoebel, *The Cheyenne Way* (1941). See also Hoebel, "Fundamental Legal Conceptions in Primitive Law," 51 Yale L.J. 951, 966 (1942). For a more recent assertion of the realist position, see Seidman, *Research in African Law and the Processes of Change* 12–13 (1967).

21. This was in fact the method whereby Llewellyn and Hoebel collected their case materials during the course of two summers. *Op. cit. supra* note 20, at viii.

22. See Epstein, *op. cit. supra* note 10, at 222–23. Anthropologists have, in consequence, written the classic works in the jurisprudence of customary law and the judicial process in Africa. See, e.g., Bohannan, *op. cit. supra* note 10; Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (2nd ed. 1967); Gulliver, *Social Control in an African Society* (1963). Few anthropologists working within Kenya have turned their attention specifically towards legal problems, but an outstanding example of the use of case materials to illuminate the nature of authority and the process of dispute settlement is Spencer, *The Samburu* (1965).

Other investigators—settlers,[23] travellers,[24] missionaries,[25] early administrators[26]—have been limited to rule-directed interviews.

In recent years, however, the development and modernization of African legal systems has created a significant new resource for the study of customary law. Judicial structures, recognized or created by the colonial regimes to administer indigenous law and retained by the independent states with some modifications, are increasingly producing written records of their proceedings, possessing ever greater detail and comprehensiveness.[27] These materials have for some time been used by administrators,[28] who perhaps are favourably predisposed since they often sit at the appellate level of this judicial hierarchy. But other disciplines, while allowing court records a limited value, appear reluctant to use them extensively. Although some anthropologists have supplemented observation with written data,[29] many appear to view both the courts and their records with suspicion.[30] And it is unquestionably true that courts are an alien institution which modify traditional custom as they apply it. Lawyers, initially more attracted to court judgments by their similarity to the subject matter of orthodox

23. See, e.g., Shaw, "Some Preliminary Notes on Luo Marriage Customs," 45-46 J. E. Afr. and Ug. Nat. Hist. Soc. 29 (1932); Augustiny, "The Tribes of Ukamba, their History, Customs, etc.," 2 E. Afr. Q. 405–13 (1905).

24. See, e.g., Gregory, *The Great Rift Valley: being the narrative of a journey to Mount Kenya and Lake Baringo* (1896); New, *Life, Wanderings, and Labours in Eastern Africa* (1897).

25. See, e.g., Cagnolo, *The Akikuyu* (1933); Stam, "Bantu Kavirondo of Mumias District (near Lake Victoria)," 14–15 Anthropos 968 (1919–20).

26. See, e.g., Beech, "Sketch of Elgeyo Law and Custom," 20 J. Afr. Soc. 195 (1921); Massam, *The Cliff Dwellers of Kenya* (1927).

27. Again, I must acknowledge that I am merely following the lead of earlier investigators in utilizing this source. See, e.g., Allott, "Methods of Legal Research into Customary Law," 5 J. Afr. Admin. 172, 173 (1953); Hall, *supra* note 13; Hall, *supra* note 12; Lewin, "The Recording of Native Law and Custom," 37 J. Roy. Afr. Soc. 483, 485 (1938); African Studies Branch, Colonial Office, "Methods of Recording Native Customary Law," 1 J. Afr. Admin. 130 (1949).

28. See, e.g., Penwill, *Kamba Customary Law* (1951) (District Commissioner, Machakos District); Edgar, *Notes on Kipsigis Customary Law* (1958) (cyclostyled; copy in Law Courts, Nairobi) (District Officer, Kericho). Nevertheless, though both authors state explicitly that they rely on court records, neither quotes the facts of a single case. Compare Howell, *A Manual of Nuer Law* (1954) (Asst. Dist. Commr. Zeraf Dist., Sudan; extensive quotation of cases).

29. See, e.g., Bohannan, "Homicide and Suicide in North Kavirondo," in African Homicide and Suicide 154 (Bohannan ed. 1960); Wilson, *Luo Customary Law and Marriage Laws Customs* (1961); LeVine, "Gusii Sex Offences: a study in social control," 61 Amer. Anthrop. 965 (1959); cf. Lloyd, *Yoruba Land Law* (1962); Crawford, *Witchcraft and Sorcery in Rhodesia* 1–8 (1967); Fallers, *Law without Precedent* (1969).

30. See, e.g., Goldschmidt, *op. cit. supra* note 14, at 21: "On the whole, however, these court cases are the least satisfactory of my data, not only because it is difficult to assess the influence of other cultures on actions taken, but because they were always fragmentary. . . . I find that court cases are relatively unimportant to the analysis, and I have used them with caution." Cf. Cory, *Sukuma Law and Custom* (1953) (Tanganyika Government Sociologist).

legal research,[31] seem to have been disenchanted for a reason just the obverse of that of the anthropologists. Customary courts, to lawyers, are insufficiently like their European models—generally highly informal and frequently tainted with corruption—and their judgments are sadly lacking in judicial reasoning.[32]

In preparing my own research plan, I knew beforehand that I lacked the skills to observe actual cases. Persuaded by the complementary objections of anthropologists and lawyers to court records, I anticipated that I would concentrate on rule directed interviews. Instead, my initial exposure to court records convinced me that here was an invaluable source of information on customary law, far superior to any other accessible to me. Consequently, I devoted almost the entire year I lived in Kenya to the selection and summary of case reports, collecting a total

31. See, e.g., Kerr, *The Native Law of Succession in South Africa* (1961); Elias, *The Nature of African Customary Law* 3 (1956). In discussing the methods he employed to determine the rules of customary law, Elias refers to "the increasing volume of recorded judicial decisions of statutory courts established in many areas of the Continent—by far the most reliable source of information for the legal theorist no less than for the professional lawyer." Nevertheless he does not quote or cite a single such case in his extensive treatise.

32. See, e.g., Allott, *supra* note 27, at 173: "The potential investigator should be warned that: (i) records of proceedings are frequently imperfect (perhaps containing little more than the claim and the decision without any reasons therefor), or unintelligible, or not in English; (ii) native court records are often disappointing for one seeking a statement of the rules of customary law (it may be necessary to read the whole case, including the evidence as recorded to get an idea of the point at issue); (iii) bias or perversion of justice may intrude into a decision. . . ." Compare Allott, *Essays in African Law* 84–94 (1960); Park, *The Sources of Nigerian Law* 83–97 (1963). See also Cotran, *Report on Customary Criminal Offences in Kenya* 2–6 (1963) (no use made of case materials); Cotran, *Restatement of African Law, Kenya*, vol. 1: *The Law of Marriage and Divorce* (1968) (no use of the vast bulk of case material from the primary and appellate courts). But anthropologists have recognized, and demonstrated, how legal principles can be derived from a study of the entire body of testimony when read in conjunction with the judgment of a case. See, e.g., Fallers, "Customary Law in the New African States," in *African Law: New Law for New Nations* 71, 82 (Baade ed. 1963). Nevertheless, the most recent evaluation of the utility of primary court decisions, representing a consensus of lawyers and anthropologists, has been generally unfavourable. See Allott, Epstein and Gluckman, "Introduction", in *Ideas and Procedures in African Customary Law* 1, 8–9 (Gluckman ed. 1969).

> "First, how far can a clear rule of law, in its full context, be derived from a single judicial decision? Where one has only a short statement of a decision, without full presentation of the arguments and judicial reasoning, it is difficult to see how the decision was arrived at to fit the particular set of circumstances before it. . . . Secondly, since only a few, or even no, cases in certain areas of dispute may occur in any period of time, information has to be collected by discussions both with customary judges and with ordinary citizens, on remembered disputes and on cases stated, varied as much as possible, as well as on statements of what customary rules were and are."

It will be clear from my previous discussion of research methods that I question the theoretical underpinnings of the techniques advocated. I hope that the case analyses presented below will answer some of the criticisms of the case method which this quotation expresses.

of more than 4,000 from about forty courts. I found it necessary to supplement these materials in only one significant respect, with data on out-of-court arbitration, in order to place the role of the courts within the wider perspective of conflict resolution.

The purpose of this paper is to describe the case materials available for the study of customary law in Kenya, with illustrations from the data I gathered, and locate them within the context of the judicial and extra-judicial structures for dispute settlement. In the process I will try to demonstrate how these resources justify the claims of the case method, and to answer the criticisms of anthropologists and lawyers. Although my research was restricted to Kenya, I hope this analysis of techniques and materials will have some value for those engaged in similar work elsewhere, especially in those parts of anglophonic Africa which possess comparable legal systems.

II. Judicial System[33]

As early as 1897, only two years after the declaration of the East Africa Protectorate[34] (as Kenya was then known), the British administration formally recognized certain indigenous agents of dispute settlement by granting jurisdiction to existing "courts" of local chiefs and councils of elders.[35] Although avowedly based on traditional institutions, these courts were an integral part of the unitary judicial system of the Colony.[36]

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33. For a comprehensive history of the primary courts of Kenya up to 1945 see Phillips, *Report on Native Tribunals* (1945). More recent descriptions are: Phillips, "The African Court System in Kenya", 4 J. Afr. Admin. 135 (1952); Carson, "Further Notes on the African Courts System in Kenya", 10 J. Afr. Admin. 34 (1958); Cotran, "Kenya," in *Judicial and Legal Systems in Africa* 89 (Allott ed. 1962); Watts, "The Court of Review, The Appeal System, African Courts: Chapter 11 of the Laws of Kenya", 2 E.A.L.J. 151 (1966); Cotran, "Integration of Courts and Application of Customary Law in Kenya", 4 E.A.L.J. 14 (1968). See generally *Colony and Protectorate of Kenya: Native Affairs Department, Annual Report* (1925–47); *Colony and Protectorate of Kenya: African Affairs Department, Annual Report* (1948–57); Mungeam, *British Rule in Kenya*, 1895–1912: *The Establishment of Administration in the East Africa Protectorate.* (1966).

34. On July 1, 1895. Hardinge to Salisbury, 2 July 1895, F.O.C.P. 6761; *London Gazette*, 15 June 1895. Cited in Low, "British East Africa: The Establishment of British Rule, 1895–1912", in II *History of East Africa* 1, 6 (Harlow and Chilver eds. 1965).

35. Native Courts Regulations, 1897, No. 52, ss.2 (*b*), 46 (East Africa Protectorate). At the same time, the government established the beginnings of what it hoped would be a system of direct rule, in the form of Native Courts presided over by European officers. s.2 (*a*). Nothing ever came of this idea and it was abandoned about 1908. See Phillips, *Report on Native Tribunals* 7–10 (1945).

36. See Phillips, *op. cit. supra* note 35. Lawyers were also allowed to appear. Native Court Regulations, 1897, No. 52, s.81 (East Africa Protectorate); Rules for the Administration of Justice in Native Courts under the East Africa Order in Council, 1897, s.52 (Oct. 21, 1899); Native Court Practitioners Rules, 1899 (Oct. 23, 1899) (East Africa Protectorate).

Five years later the administration moved a step further from tradition, strengthening the powers of those chiefs already recognized,[37] and delegating additional judicial authority to the newly instituted official headmen.[38] In 1910, noting the erosion in the influence of indigenous elders as a result of the novel powers conferred on chiefs and headmen, the new Governor, Sir Percy Girouard, sought to reaffirm their position, guided by the principle of indirect rule.[39] But little was changed until 1930, when a major revision separated the judiciary from the executive powers of the chief or headman and further segregated the African judicial machinery from the structure serving the rest of the population.[40] Revitalized panels of elders, explicitly constituted "in accordance with the native law or custom of the area"[41] now formed the base of a judicial hierarchy in which appeal lay to Native Appeals Tribunals,[42] and then

37. East Africa Native Courts Amendment Ord., No. 31 of 1902. Section 2 authorized the Commissioner to proclaim any district a special district to which the 1897 Regulations would not apply; he made such a proclamation that same day with respect to all the provinces apart from the coast: Ukamba, Naivasha, Kisumu, Kenya and Jubaland. However, s.15 (1) of the Ordinance perpetuated the chief's courts: *Nothing herein to affect the power of the Commissioner to recognize the jurisdiction of a tribal Chief over the members of his tribe, or the exercise by such tribal Chief of such authority as may be lawfully vested in him, or may be granted to him by the Commissioner.*

38. Village Headman Ord., No. 22 of 1902, s.6 (East Africa Protectorate): *The Commissioner may make rules conferring upon any headman or any body of headmen in any village or group of villages the power to hear and determine petty native cases to such extent and upon such conditions as to appeal and procedure as the Commissioner may determine.* The jurisdiction of both types of court was limited to members of the tribe, and in some cases only of the village, in which the court sat. Courts Ord., No. 13 of 1907, s.10(1) (East Africa Protectorate); Rules Under Section 10 of the "Courts Ordinance, 190, ss.2, 9 (Mar. 30, 1908).

39. Native Tribunal Rules, 1911, s.2 (1) (Apr. 4, 1911) (East Africa Protectorate): *The powers conferred by these rules shall be exercised only by such Councils of Elders as* are constituted under and in accordance with Native law and custom *and are recognized by the Governor* [emphasis added]. Native Authority Ord., No. 22 of 1912, s.2 (1) (East Africa Protectorate): *The Governor may appoint any Chief or other Native or any Council of Elders to be Official Headman or Collective Headmen . . .* See Phillips, *op. cit. supra* note 35, at 13–15. This emphasis on indirect rule appears to have been short-lived, for the emphasized words in the 1911 Rules were eliminated two years later by the then Governor, H. C. Belfield. Native Tribunal Rules, 1913, Government Notice No. 43, ss.2, 3 (Feb. 6, 1913) (East Africa Protectorate). See also Courts Ord., Laws of Kenya, cap. 5, s.11 (1926).

40. Native Tribunals Ord., No. 39 of 1930 (Kenya). Advocates were now excluded. s.24. Authority was extended to all causes of action arising within, crimes occurring within, or defendants residing within, the jurisdiction of the court. ss.10, 11.

41. s.4.

42. s.33 (1). The Provincial Commissioner, with the approval of the Governor, could appoint a Native Tribunal, presided over by a headman, or senior elder, or composed of three selected elders, to be a court of appeal. In Coast Province, the Moslem *Liwali* or *mudir* was later included as an intermediate appellate authority, Native Tribunals (Amendment) Ord., No. 38 of 1940, ss.6–8.

to District[43] and Provincial Commissioners.[44] On the recommendations of the Phillips report[45] this structure was reformed in 1951.[46] A start was made toward assimilating the judicial system of the African community to the pattern of that principally used by non-Africans:[47] tribunals were renamed African Courts and ultimate judicial review was transferred from the Provincial Commissioner to a newly created Court of Review.[48] Later, a single level of lay magistrates replaced both the African Courts of Appeal[49] and review by administrative officers.[50] Finally, seventy years after the introduction of a plural legal system in Kenya, the Magistrate's Courts Act[51] substantially eliminated the remaining dualism, transforming African Courts into District Magistrate's Courts,[52] competent to hear cases involving all residents of Kenya,[53] with a single route of appeal to First Class[54] or Resident Magistrates,[55] then to the High Court[56] and in the last resort to the Eastern Africa Court of Appeal.[57]

Cases heard by the indigenous institutions recognized by, or novel tribunals created under, enactments predating 1930 were not recorded,[58]

43. s.34 (1), (2). Appeals were later transferred to the District Officer. Native Tribunals (Amendment) Ord., No. 31 of 1933.
44. s.34 (3). Provision was made for ultimate review in the Supreme Court by means of a case stated, s.34 (4), but none was ever taken. See Phillips, *op. cit. supra* note 35, at 5; Watts, *supra* note 33, at 156.
45. *Op. cit. supra* note 35.
46. African Courts Ord., No. 65 of 1951.
47. In establishing these courts, the Provincial Commissioner was no longer bound to follow native law and custom, but could determine the constitution of the court, order of precedence, method of deciding in cases of dispute, limits of jurisdiction, quorum and use of assessors. s.6.
48. s.43. This court consisted of a chairman appointed by the Governor, the Chief Native Commissioner, the African Courts Officer, and an African appointed by the Governor (Shadrack Malo a former President of the Central Nyanza African Court of Appeals). African Courts Ord., No. 65 of 1951, s.4 (2). In 1962 the Chief Native Commissioner was replaced by a second African. African Courts (Amendment) Ord., 1962, No. 50 of 1962, s.4 (1).
49. Allowed to die out through lack of appointments in the early 1960's.
50. African Courts (Amendment) Ord., No. 50 of 1962, s.38.
51. No. 17 of 1967.
52. ss.8, 43 (1), Second Schedule s.2.
53. Compare Magistrate's Courts Act, No. 17 of 1967, ss.9, 10, with African Courts Ord., No. 65 of 1951, s.9.
54. Appeals from a Third Class Magistrate's court in civil cases are to a First Class Magistrate. s.12.
55. Appeals from a Third Class Magistrate's court in criminal cases are to a Resident Magistrate. s.4.
56. Appeals from a Second or First Class Magistrate or a Resident Magistrate are to the High Court in both civil matters, Civil Procedure Ord., Laws of Kenya, cap. 5, s.65 (1) (1948), and criminal, Criminal Procedure Code, Laws of Kenya, cap. 75, s. 347(1) (rev. ed. 1962), as amended by Magistrate's Courts Act, No. 17 of 1967, s.30.
57. Criminal Procedure Code, Laws of Kenya, cap. 75, s.361 (1) (rev. ed. 1962); Civil Procedure Ord., Laws of Kenya, cap. 5, s.72 (1948).
58. See Watts, *supra* note 33, at 155. At that time this was thought to be too obvious to require expression in the legislation, but it may be seen indirectly in the fact that European administrators, in exercising their powers of revision, were to treat the controversy as an original case and hear it *de novo*. See, e.g., Rules under Section 10 of the "Courts Ordinance, 1907", s.5 (Mar. 30, 1908); Native Tribunals Rules, 1913, Government Notice No. 43, s.14 (Feb. 5, 1913).

and hence are lost to scholarship except as they may be studied through the memories of informants. The 1930 Ordinance reorganized these disparate bodies into several hundred native tribunals,[59] each consisting of as many as fifty or more elders. These, like their predecessors and successors, were instructed to apply "the Native Law and Custom prevailing in the area of the jurisdiction of the tribunal."[60] The elders were presumed to know this customary law as an integral part of their inherited tradition, a reasonable presumption since they were men of little education, few European contacts, and served exclusively within their own tribe.

During the next three decades the administration gradually attempted to restructure these tribunals according to a European model. Their numbers were reduced to a fairly stable figure of just over a hundred in 1966.[61] The membership of each court was transformed from a large group of elders participating irregularly for nominal pay to a much smaller, more professional body, earning substantial salaries for fixed duties, and hearing individual cases in panels of no more than ten;[62] by 1966 few courts had more than four members. Although the Native Tribunals Ordinance did not make explicit provision for the recording of proceedings, the literate clerks attached to these courts were encouraged to do so as far as they were able; useful records began to appear in the 1950's, and improved dramatically in the next fifteen years.[63]

59. In 1943 there were 139 tribunals, already a substantial decrease from the situation ten years earlier. See Phillips, *op. cit. supra* note 35, at 6. Between 1930 and 1937, in Kavirondo Province, for instance, 78 locational tribunals were reorganized into 20 divisional courts. *Id.* at 17.

60. Native Tribunals Ord., No. 39 of 1930, s.13 (*a*). Similar provisions can be found in all legislation pertaining to the judiciary, from the earliest, Native Courts Regulations, No. 52 of 1897, s.4 (Aug. 12, 1897), to the most recent, Magistrate's Courts Act, No. 17 of 1967, ss.2, 10(1)(*a*); Judicature Act 1967, No. 16, s.3 (2).

61. See Phillips, *op. cit. supra* note 35, at 13–15; Watts, *supra* note 33, at 155. See also the warrants establishing each court, which state when the court was created, when abolished, and list its personnel. These are kept in the offices of the Provincial Commissioners and in the Law Courts, Nairobi.

62. See generally Phillips, *op. cit. supra* note 35, *passim*. In Kavirondo Province, for instance, by 1943, elders were earning as much as Shs. 65/- a month, and the tribunal president up to Shs. 150/-. *Id.* at 20. In Kisii District panels of six elders chosen from a pool of 18 heard individual trials. *Id.* at 29.

63. See Watts, *supra* note 33, at 155. The 1930 Ordinance omitted the requirement, contained in earlier enactments, that appeals be heard *de novo*. By 1950 parties were requesting copies of the record and judgment with sufficient frequency to require the setting of a fee for this service. Native Tribunals (Fees and Fines) (Amendment) Rules, 1950, Government Notice No. 867 (July 21, 1950). The African Courts Ordinance, No. 65 of 1951, provided for revision based on the record alone. s.39 (1)(*a*). During the 1950's a series of handbooks for the guidance of African Courts gave detailed instructions concerning the recording of evidence and the writing of judgments. See [Watts], Standing Orders for African Courts, ss.23–28, 104–18 (1956); Tennent, *Notes and Instructions for the Guidance of African Courts* 2–7, 11–14 (1959) (Kakamega District); *Notes and Instructions for the Guidance of African Courts* 36 (1959) (Machakos District). While the above were merely advisory, the Chief Justice promulgated, under the authority of African Courts Ord., No. 65 of 1951, s.62 (*h*), binding rules requiring the recording of evidence and a reasoned judgment. African Courts Civil Procedure Rules ss.42, 49 (n.d.); Criminal Procedure Rules for African Courts ss.54, 59 (n.d.).

The Magistrate's Courts Act of 1967[64] completed this process, eliminating several more courts to leave a total of ninety,[65] each staffed by one to four magistrates sitting individually.[66] Because these were men of superior English literacy, often clerks of the former African Courts, their reports of cases developed from a mere listing of the names of parties and the result to a full, if not verbatim, record of the evidence followed by a reasoned judgment. These lay magistrates are currently receiving intensive instruction in law emphasizing the basically English procedure and Kenya substantive legislation they must apply. Training in customary law is limited, even though familiarity with it can no longer be taken for granted.[67] The present younger generation of magistrates have often

64. No. 17.

65. As of August, 1967, these were: (*by province and district, with the principal tribe in parentheses*)
   1. Nyanza Province
      (*a*) Central Nyanza District: Kisumu (or Winam), Ukwala, Nyando, Maseno, Bondo, Siaya (Luo).
      (*b*) South Nyanza District: Doho Kosele, Suba Kuria, Bura Ndhiwa, Bura Rongo, Homa Bay (Luo).
      (*c*) Kisii District: (Ritongo) Kisii, (Ritongo) Kuja, (Ritongo) Manga, (Ritongo) Gesima (Gusii).
   2. Central Province (Kikuyu)
      (*a*) Nyeri District: Nyeri, Othaya, Karatina, Mukurweini.
      (*b*) Thika District: Thika.
      (*c*) Kiambu District: Kiambu, Limuru, Gatundu, Kikuyu, Githunguri.
      (*d*) Murang'a District: Fort Hall, Kigumo, Kandara, Kagima.
      (*e*) Kirinyaga District: Kerugoya, Gichugu, Wambugu.
      (*f*) Nyandarua District: Nyandarua, Thomson's Falls.
   3. Rift Valley Province
      (*a*) Nakuru District: Nakuru, Naivasha, Molo.
      (*b*) Trans Nzoia District: Kitale (Elgeyo, Marakwet).
      (*c*) Uasin Gishu District: Eldoret, Chepkorio (Elgeyo, Marakwet).
      (*d*) Nandi District: Kapsabet, Kabiyet (Nandi).
      (*e*) Kericho District: Kericho, Silibwet, Sotik, Sosiot (Kipsigis).
      (*f*) Baringo District: Baringo (Pokot).
      (*g*) Narok District: Narok (Masai).
      (*h*) Kajiado District: Kajiado (Masai).
      (*i*) Laikipia District: Nanyuki (Masai).
   4. Coast Province
      (*a*) Mombasa District: Mombasa (or Tononoka).
      (*b*) Kwale District: Kwale (Duruma), Gazi (or Gwirani) (Digo).
      (*c*) Kilifi District: Kilifi, Kaloleni, Malindi (Giriama).
      (*d*) Taita District: Voi, Wundanyi (Taita, Taveta).
   5. Western Province (Luyia)
      (*a*) Bungoma District: Bungoma, Sirisia, Kimilili, Broderick Falls.
      (*b*) Busia District: Funyula, Nambare.
      (*c*) Kakamega District: Kakamega, Hamisi, Emuhaya, Ikolomani, Mumias, Butali, Mbale, Khwisero.
   6. Eastern Province
      (*a*) Machakos District: Machakos, Uaani, Siathani, Kikumbulyu, Nziu, Kilungu, Kangundo (Kamba).
      (*b*) Kitui District: Migwani, Kitui (Kamba).
      (*c*) Embu District: Embu, Siakago, Runyenje's (Embu).
      (*d*) Meru District: Meru, Maua, Miathene, Nkubu, Chuka (Meru).
   7. Nairobi: Makadara, Kibera.

66. s.8(1).

67. s.18: *A magistrate's court may, if it thinks fit, call for and hear evidence of the African customary law applicable to any case before it.*

been isolated from their homes at an early age, attending boarding school, living in urban areas, and later at university. Furthermore, some are now being posted outside their tribal jurisdiction altogether. The rules they administer are therefore going to bear a diminishing resemblance to traditional practice.

How does this structure function, and what information does it provide about the administration of customary law? A rough estimate suggests that in 1966 the primary courts decided about 50,000 civil and nearly 200,000 criminal cases.[68] Civil cases were almost all governed by customary law, i.e., an unwritten rule whether traditional or modern.[69] But legislation figured prominently in most criminal prosecutions.[70] Indeed, the Constitution abolished all unwritten criminal law as of July 1, 1966.[71] Moreover, little more than a tenth of all prosecutions were brought under the Penal Code,[72] the remainder consisting of contraventions of administrative regulations concerning trespass,[73] boundary markers,[74] markets,[75] licen-

68. The last official statistics available are those for criminal cases in 1961, when 153,441 cases were decided. *Republic of Kenya, Judicial Department Report*, 1961–1963, at 17 (1965). But I abstracted from the annual returns of each court, kept in the Law Courts, Nairobi, some data on the quantity of litigation for 1966. My own totals, perhaps somewhat inaccurate, show 51,225 civil and 191,914 criminal cases. These figures have steadily increased in the recent past.

69. The only civil statute which the courts were authorized to administer was the Affiliation Ord., No. 12 of 1959, Laws of Kenya, Cap. 12, s.2 (rev. ed. 1962) since repealed. In 1966 my notes show 789 affiliation proceedings. The Magistrate's Courts Act No. 17 of 1967, does, however, anticipate a general civil jurisdiction, either under the customary law, s.10(1)(*a*), or, subject to a jurisdictional limit determined by the amount in claim, under the common or statutory laws of Kenya, s.10(1)(*b*).

70. In 1966, when courts had authority to punish customary crimes during the first six months, they heard only 2,049 cases, or about one per cent of all prosecutions. Hence even prior to 1966 customary criminal law was not very significant. However, the percentages varied greatly from area to area. In Nyando African Court, a Luo tribunal, for instance, violations of the Penal Code were only three times more frequent than customary crimes. But in Sosiot African Court, in Kipsigisland, Penal Code prosecutions were more than one hundred times as frequent.

71. Kenya Order in Council 1963, S.I. 1963/791, Schedule 2, The Constitution of Kenya, ss.8(8), 8(16). This section was implemented by African Courts Officer, Circular No. AC 13/1/11/70 (June 18, 1966) which instructed African Courts to terminate all pending prosecutions under customary law, with leave to the complainant to file a civil suit upon payment of additional fees. See, e.g., Maseno African Court Criminal Case 454/66 (July 22, 1966) (prosecution for removing a married woman from the custody of her husband under Luo customary law; plaintiff informed he can pay Shs. 50/- in addition to the initial Shs. 16/- fee and sue for the return of his wife).

72. My total for 1966 shows 22,875 prosecutions under the Penal Code, or just about 12 per cent of all criminal cases.

73. Trespass Ord., No. 48 of 1962, Laws of Kenya, Cap. 294 (rev. ed. 1963).

74. Land Adjudication Act, Laws of Kenya, Cap. 283, s.35(4)(*a*) (rev. ed. 1964), as amended by Land Adjudication Act 1968, No. 35 of 1968, s.34(*d*); Registered Land Act, Laws of Kenya, Cap. 300, s.24 (rev. ed. 1964).

75. Marketing of African Produce Ord., Laws of Kenya, Cap. 320 (rev. ed. 1962).

sing,[76] taxation,[77] stock movement,[78] production or consumption of alcohol[79] or narcotics,[80] or non-compliance with the orders of administrative personnel.[81] Nevertheless, the primary courts can[82] and do award compensation to the victims of criminal offences according to what is basically an unwritten law, derived, at least in part, from the customary law of wrongs.[83] An individual court, on average, may hear about 500 civil[84] and 1,000 criminal[85] cases each year. Court records generally date back several decades, sometimes to the 1930's, though physical condition of course deteriorates radically with age. All are stored in the office of the court which passed judgment, unless the case has been appealed.[86] Although none are in vernacular many, especially in Coast, Nyanza and Western Provinces, were recorded in swahili, at least until very recently. (A more detailed statistical analysis of the utilization of primary courts may be found in Part IV of this article.)

76. Traders Licensing Ord., Laws of Kenya, Cap. 497 (rev. ed. 1962).
77. Personal Tax Ord., Laws of Kenya, Cap. 470 (rev. ed. 1962).
78. Animal Diseases Ord., Laws of Kenya, Cap. 364 (rev. ed. 1962).
79. African Liquor Ord., Laws of Kenya, Cap. 122 (rev. ed. 1962).
80. Dangerous Drugs Ord., Laws of Kenya, Cap. 245 (rev. ed. 1962).
81. Native Authority Ord., Laws of Kenya, Cap. 128 (rev. ed. 1962).
82. African Courts Ord., Laws of Kenya, Cap. 11, ss.19(1) 22, 23 (rev. ed. 1963); Magistrate's Courts Act, No. 17 of 1967, s.9(1); Criminal Procedure Code, Laws of Kenya, Cap. 75, ss.175, 176 (rev. ed. 1962).
83. See, e.g., Kosele African Court Criminal Case No. 33 of 1966 (Jan. 20, 1966) (court ordered accused to pay customary compensation of the heifer for virginity in a prosecution for indecent assault, Penal Code, s.144); Bungoma District African Court Criminal Case No. 493 of 1967 (June 22, 1967) (court ordered accused to pay customary compensation of a sheep in a prosecution for common assault, Penal Code, s.250). The following abbreviations will be used hereafter in citing cases: African Court—AC; District African Court—DAC; African Court of Appeal—ACA; District Officer—DO; Appeal Magistrate—Mag; Court of Review—COR: Civil Case—CC; Criminal Case—CrC; Civil Appeal—CA; Application—Appl. Each case will be cited by number and year, e.g., 234/65, followed by the presiding judge, where significant, and date of decision, where available, e.g. (AINLEY, C. J., Jan. 1, 1966). Although it is customary to cite cases by the names of the parties, I have omitted the names in all the citations that follow in order to preserve the anonymity of the individuals involved, since the case numbers provide adequate identification for anyone wishing to do further research in this area.
84. The numbers range from 93 for the Kilgoris African Court, in the Masai area of Narok District, Rift Valley Province, since closed down, to 1,694 in the Kavujai African Court, serving the Luyia of Western Province.
85. The statistics range from 146 in the Kapkatet African Court in the Kipsigis area of Kericho District, Rift Valley Province, since closed down, to 3,231 in the Kapsabet African Court, Nandi District. In the urban areas totals are much higher, e.g., Tononoka African Court—17,714 (Mombasa); Makadara African Court—10,087 (Nairobi).
86. See African Courts Officer, Circular No. 1 of 1963 (Jan. 25, 1963) amending Standing Order No. 180 (case file to be kept in highest court which has passed judgment). Compare African Courts Civil Procedure Rules ss.77–79 (n.d.) (case file to be returned to court of first instance).

III. Case Studies

In the light of this sketch of the quantity of material available, the value of information obtainable from illustrative cases may be placed in proper perspective. The following case[87] is quoted in full, as far as possible in the same form as the original record. The parties are all Luo.[88]

Plaintiff: Augustino, Kanyawegi village, Kisumu location, Central District, Nyanza Province.

Defendants: Isabella w/o Onyango, Atieno w/o Onyango } same residence

Claim: Shs. 200/- damages for defamation (filed Aug. 18, 1966).

Plaintiff (*Male, Christian, duly sworn, states*):

The defendants said on 13 August [1966] that I am a witchcraft man, that I have killed their son, that I am a *jadak*[89] in their area and should go to Nyakach[90] which is my original home (*loka* [in *dholuo*]). The reason for this is that their son, Ogalo Onyango, disappeared from their home; he was searched for and finally a report was received that he had died. Then the defendants broke out with cry (*sic*) with my name that I killed him; they cried in their *boma*[91] in the absence of their husband. When Onyango returned he collected money and went to search for his son in Sakwa.[92] But later it was revealed that Ogalo is alive, and living up the hill at Kapotman.[93] I did not see Ogalo myself when he returned—he stayed just one night—but my boys told me. Then Ogalo went back to where he is living in order to escape the summons of the court, for he had been accused by another boy. (*Examined by Atieno*): There was no outstanding grudge between me and Ogalo. (*Examined by Court*): I am only a

87. Kisumu DAC CC 299/66 (Aug. 31, 1966). Because of limitations of space I have had to select shorter cases. For the same reasons as stated earlier, see note 83 *supra*, I have deleted all the names of parties and witnesses, using what I hope are appropriate pseudonyms in their place.

88. A Nilotic tribe numbering just over a million and occupying most of Central and South Nyanza Districts of Nyanza Province. See *Kenya, Ministry of Economic Planning and Development, Statistics Division, III Kenya Population Census, 1962*, at 36 (1966) [hereinafter cited as *Kenya Census*, 1962].

89. "An unrelated person who is given land on a permanent usufruct which is determined by his fulfilment of customary obligations". Wilson, *Luo Customary Law and Marriage Laws Customs* 12 (1961).

90. Name of a Luo lineage (or tribe), and also of a location, in Central Nyanza, between the Nyando and Sondu Rivers; about 25 miles southeast of Kisumu location and lineage, where the defendants live.

91. A swahili word, literally meaning fort, but widely used for home. Among the Luo it refers to the living area surrounded by an *ojuok* (euphorbia) hedge.

92. Luo lineage (or tribe) and location in Central Nyanza, about 40 miles west of Kisumu.

93. In Nandi District, Rift Valley Province, and thus outside the jurisdiction of African Courts or Administrative Police in Central Nyanza District, Nyanza Province.

few yards from the *boma* of defendants. I went there on bicycle quickly alone. I saw Omolo and Oburu standing there; they also heard the defamation. I did not report the defendants to the *joduong' gweng'*[94] before suing them here because I was angry.

Plaintiff's witness, Oburu, (17 *years old*): On Saturday, 13 August, I was in the *boma* of Onyango when the defendants, returning from the lake (*nam* [in *dholuo*]) broke out into a cry for their son who was alleged to have died. Atieno entered the *boma* carrying a *karai*[95] and a basket (*odheru* [in *dholuo*]) and threw them down and said: "Aaa. Augustino, how have you killed the son of Onyango so badly like this." Isabella started to cry: "Augustino, let all your wives give birth to many children and name them after Ogalo." Then she said: "let Onyango take any cattle he would have slaughtered for the people who came to the funeral (*joliel* [in *dholuo*]) and use them to employ a clever man to take revenge against Augustino for killing his son." (*Examined by Isabella*): When you came from the lake I was in the house (*simba* [in *dholuo*]) of your son Odhiambo. (*Examined by Court*): Augustino was present in the *boma* at the time that the defendants started crying.

Defendant 1 (Isabella) (*Female, Christian, duly sworn, states*): I did not defame Augustino's name. I only said that it is ridiculous how the boy Ogalo died in a far place where we do not know. (*Examined by Augustino*): We only received a letter which informed us that Ogalo is vomiting blood and is likely to die, but we did not cry.

Defendant 2 (Atieno) (*Female, Christian, duly sworn, states*): I did not defame Augustino's name. We had no grudge against him which could make us mention his name. I did not see him come to our *boma* at all. (*Examined by Augustino*): Our son did not die, but we received a letter saying that he is likely to die, but we did not cry. I went to Sakwa where my son died and slept there on 13 August.

Defendants' witness, Mathias: A letter came from Sakwa on 13 August to say that the defendants' son was beaten there. So the two defendants went there that very day to see him. I never heard them cry anything. (*Examined by Court*): I live in the *boma* of defendants because they are the wives of my uncle (*nera* [in *dholuo*]).

Defendants' witness, Otieno: I live near the defendants. When I entered their *boma* I heard them say, why had their son Ogalo died outside? They were only talking, not crying.

94. Elders of a locality. See Wilson, *op. cit. supra* note 89, at 13.
95. I believe that this is a knife or spear, probably used in fishing.

Judgment [The court awarded the full claim and Shs. 32/- costs.] Plaintiff's evidence was corroborated by the testimony of his eye-witness, but defendants offered mere denials. The court does not believe that the defendants contented themselves with the mild words they state now. Always when the mother received information that her son or daughter has died she usually cried very loud according to Luo customs.

The total sequence of events in this case can be re-constructed in outline. Ogalo, the son of one of the defendants (co-wives of Onyango) got into a fight away from home, in which both he and his adversary were injured. He fled the scene and hid to avoid prosecution, but a letter reached his home, where people were already alarmed by his prolonged absence, which contained an inflated rumour that he was dead or dying. The defendants immediately burst into a lament, blaming the tragedy on Augustino's witchcraft. Augustino heard their cries, and when he came to investigate the accusations were repeated. The women then rushed off to see the dying boy, but failed to find him, as did their husband in a later search. In fact, Ogalo did not die but was merely hiding to escape justice and when he revisited his family the witchcraft accusation was dropped. Augustino then went straight to court, filing his complaint five days after the incident, as soon as he was able to collect the necessary Shs. 32/- fees.[96] He failed to submit the dispute to arbitration because, in his anger, he wanted quick action. In the event, he received his full claim less than three weeks after the incident.

There is little to be learned from the three sentence opinion taken in isolation, and this paucity of reasoning, typical of many primary court judgments, may be one reason for their neglect by lawyers. But when the court record is read as a whole, patterns of assertion, adversarial response, and judicial determination (whether implicit or explicit) may be discerned which identify the sources of conflict and illuminate the way in which controversial conduct is defended and evaluated. Let me try to demonstrate this through a detailed analysis of the relatively simple facts of this case, with the aid of Luo ethnography.

Although Augustino stated his claim as one for defamation,[97] thus

96. Court fees in most civil cases are proportioned to the amount claimed. A demand for Shs. 200/- requires a fee of Shs. 26/-, plus Shs. 6/- for service of an additional defendant. See African Courts (Fees and Fines) Rules, Laws of Kenya, Cap. 11, Subsidiary Legislation, Schedule, ss.2, 3 (rev. ed. 1963). Many rural Africans would not have that amount available in cash, and would have to borrow or sell some produce.

97. Augustino is in fact illiterate, as shown by the fact that he signified his acceptance of the record of his testimony by a thumb-print rather than by signing his name. Therefore it is likely that it was the court clerk who filled out the forms, and introduced English legal terminology.

dignifying it with the prestigious terminology of the English common law, the gravamen of his complaint was in fact that the defendants had spoken words which were insulting to him. Both Isabella and the court demonstrated this by focusing their questions on the critical failure of Augustino and his witness to allege that Augustino was present at the incident, an essential ingredient of the cause of action where the injury is personal affront but not where it is damage to reputation.[98] By far the more serious of the two insults alleged was the first—that Augustino was a witch who had killed the defendants' son. This accusation was made explicitly by Atieno but was also given more subtle utterance by Isabella in her cry that Augustino's wives should bear children named after Ogalo. One form of restitution for homicide in Luo customary law is for the clan of the murderer to provide a girl to bear progeny to the name of the deceased.[99] It is important to recognize that the defendants, in placing responsibility for the death of their son on Augustino's witchcraft, were not denying that the physical injury had been incurred in an ordinary fight with another man; rather, witchcraft was invoked to explain why Ogalo had become involved in the fight in the first place, and then why he had suffered such egregious harm. Widespread belief in witchcraft among the Luo has not greatly changed in the last sixty years,[100] as illustrated by the readiness with which these women—nominal Christians, if illiterate—resorted to it in trying to comprehend their tragedy. Because witches are so greatly feared they are generally avoided, and Augustino was at least threatened with ostracism if the accusation was believed. Indeed, Isabella urged more drastic action—the use of anti-witchcraft medicine[101] to take revenge for the death of her son.

The second insult alleged—that Augustino was a *jadak*, or tenant, who should go back to his clan's home—was much milder. *Jodak*[102] are

98. Augustino and his witness concurred in this characterization by affirming on examination that Augustino had been in the defendants' *boma* at the time. Further, neither argued that the words were published outside the *boma* or that Augustino's reputation was damaged.

99. See, e.g., Othieno-Ochieng', *Luo Social System* 9–10 (1968); Southall, *Lineage Formation Among the Luo* 22 (1958). Where the slayer and victim are of the same lineage, so that this solution is precluded by the rules of exogamy, the slayer may himself marry a girl whose children are named after the deceased. Butt, *The Nilotes of the Anglo-Egyptian Sudan and Uganda* 109 (1957). Isabella appears to be urging this latter remedy, which is surprising since it accepts Augustino as a member of her son's lineage, precisely the fact she was denying in calling him *jadak*.

100. Compare Northcote, "The Nilotic Kavirondo," 37 J. Afr. Soc. 58, 63 (1907) with Wilson, "Homicide and Suicide Among the Joluo of Kenya", in *African Homicide and Suicide*, 179, 185, 188–89 (Bohannan ed. 1960).

101. According to one informant, such medicine can cause witchcraft to turn against a man who uses it aggressively, and kill him.

102. Plural of *jadak*.

members of foreign lineages who have been granted land for purposes of cultivation but who suffer from insecurity of tenure and an inferior status in society.[103] To call attention to this in public is clearly derogatory.[104] Moreover, the two insults are interrelated. Augustino, as a *jadak*, was subject to immediate and automatic expulsion from his lands if the community found him to be a witch.[105] But quite apart from the possible consequences of the accusations (which would have been more significant had the action been grounded in defamation) the insults were intrinsically injurious to dignity and had to be redressed. In seeking to do so Augustino was not only preserving his own self-respect but also that of the ancestor after whom he was named and whose spirit was believed to inhabit Augustino's body:

> "A person tends to be sensitive about his *juok* [ancestor name] and 'spoiling a name' is a serious matter. An insult is not merely an insult to ego, it is also an insult to the ancestors with who [*sic*] ego shares a common *juok*, and if the insult is not avenged, they will be angry and punish the insulted man. While the origins of the belief are now largely forgotten by the young, the sensitivity remains. . . ."[106]

Luo do feel that the obligatory response to abuse, if honour is to be protected, is counter-abuse or physical violence.[107] That Augustino did not indulge in either may be due to a combination of causes including fear of legal liability,[108] and a recognition that his accusers were only women, irresponsible in the absence of their husband. But because honour requires a vigorous reply to abuse the traditional mode of arbitration by local elders is even less appropriate than violence since these arbiters are ultimately powerless to extort redress. In the circumstances of the instant case, moreover, Augustino may have apprehended that the clan elders would be biased against him, as an outsider. For these

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103. See Wilson, *op. cit. supra* note 89, at 56–62.

104. See, e.g., Kisumu DAC CC 180/66 (June 13, 1966)' (Shs. 300/- damages for being called *jadak*, among other things). See also Evans-Pritchard, "Luo Tribes and Clans", 7 Rhodes-Livingstone J. 24, 37 (1949): "*jadak* is a harsh word". It was not, however, defamatory because it was apparently true.

105. See Wilson, *op. cit. supra* note 89, at 87–88.

106. Whisson, *The Will of God and the Wiles of Man* 4–5 (1962) (cyclostyled paper read at a conference of the East African Institute for Social Research, Jan. 1962). See also Southall, *op. cit. supra* note 99, at 25.

107. See Malo, *Insult as an Offence in African Customary Law* (n.d.) (microfilm, library of African Law Section, School of Oriental and African Studies, London).

108. The development of African Courts has thus "created" the civil action of insult in two ways. Alternative methods of redress which were traditionally acceptable, counter-abuse and violence, are no longer permissible, and compensation, for which there is no precedent in tradition, is available.

reasons a demand for substantial civil damages[109] allowed him to vindicate his name promptly and effectively.

Augustino presented a strong case to the court. His own testimony contained a clear, detailed, and internally consistent statement of the facts on which he based his claim. More important, he produced an independent eye-witness who generally corroborated his evidence. Despite minor contradictions—Augustino and his witness differed, for instance, as to whether Augustino was present in Onyango's *boma* at the start of the incident—Oburu's testimony carried conviction through its wealth of additional detail, for example, the precise words of the defendants, and what Atieno was carrying. This confirmation gained probative force from the fact that Oburu was required to wait outside the court until he spoke: failure to obey this rule would have led to his disqualification as a witness.[110] Against Oburu, the defendants could only counterpose two very weak witnesses, one of whom the court quickly revealed as their close relative and member of their *boma*. In relying on plaintiff's eye-witness and discounting the testimony of the parties as well as that of defendants' relative the court was making the implicit judgment, frequently found in the reasoning of primary courts, that interested persons and their relatives can be expected to lie.[111] Equally significant is the court's observation that, whereas the plaintiff specified the particulars of defendants' wrongful conduct, the defendants contented themselves with general denials. Facts, the court appears to have reasoned, must be met with facts, not mere conclusions. The defendants may well have anticipated this criticism for they offered an alibi, which was repeated by the first defence witness. But the story they chose—that they had gone to Sakwa to see their son immediately on hearing of his misfortune —was irrelevant since they could easily have insulted Augustino before they left.

In assessing the evidence the court did more than simply weigh the quantities of independently corroborated factual detail on each side.

109. The amount claimed was largely arbitrary, though comparable to that requested in similar cases. The range is generally between Shs. 100/- and Shs. 500/-. See, e.g., Kisumu DAC CC 8/66 (Feb. 8, 1966) (Shs. 150/-); Kisumu DAC CC 5/66 (Jan. 12, 1966) (Shs. 500/- against each defendant). Because the action is not founded in custom there are no real standards. Courts will generally award the amount claimed, as in this case, although judgments are sometimes reduced where the insult is trivial or in some way justified. See, e.g., Kisumu DAC CC 394/66 (Nov. 24, 1966) (claim of Shs. 500/- reduced to judgment of Shs. 100/- because defendant was a young boy unable to pay the full amount).

110. African Courts Civil Procedure Rules, s.33 (n.d.): *The presiding member shall then order the witnesses to withdraw from the court and shall ensure that no witnesses hear the evidence given by the plaintiff, defendant or any other witness.* See Kericho DAC CC 16/66 (Mar. 10, 1966) (defence witness disqualified because present during hearing).

111. Cf. African Courts Civil Procedure Rules, s.49 (n.d.): *The judgment shall show . . . the evidence that the court believes and the evidence it does not believe.*

It employed as evidentiary rules perceptions about modal behaviour in Luo society, comparing conflicting allegations with the conduct which it believed could be expected in the circumstances.[112] Both defendants admitted receiving the news that their son was dead or dying, but denied uttering cries of grief. The court explicitly rejected this contention as inconsistent with its own experience: mothers always cry when they hear of the death of their children.[113] Thus the women, by foolishly alleging a course of behaviour that was inherently incredible, destroyed the cogency of their subsequent defence. In answering this defence the court relied on two further implicit perceptions. The first, that mothers in their grief accuse those they believe responsible for their misfortune,[114] was not contested. But Atieno forcefully challenged any inference that she or her co-defendant would tend to name Augustino as being responsible. And, even granting the court's first two perceptions, what reasons

112. In the analysis that follows I must acknowledge a debt, which anyone writing in this field shares, to Max Gluckman, for introducing the fertile concept of the "reasonable man" into legal anthropology in *The Judicial Process Among the Barotse of Northern Rhodesia* (1955). However, I believe that Gluckman's use of the term suffers from some confusion between an evidentiary test of credibility and a substantive standard of right conduct. He writes: "Legal truth involves the assessment of what happened in terms of both legal and moral norms. For the judges have to find out who has conformed with the law, and who has broken it . . . it is by these norms that the judges examine and attack evidence". *Id.* at 82. It is the primary task of a judge to determine whether the defendant has conformed to the law. In doing so the court may also make normative comments about the conduct of other parties and witnesses, and these may well be as important in their social effect as the formal judgment. But surely a judge does not make an "assessment of what happened" by measuring testimony against "legal and moral norms" such as those quoted: "respect and help your father", "treat your wife well". *Ibid.* The credibility of testimony rests on whether the conduct asserted is typical behaviour under the circumstances, not whether it is morally correct. The evidentiary standard I employ, therefore, is one drawn from *modal* behaviour. Indeed, the perceptions about modal behaviour that I find in the court's evaluation of the evidence are clearly not standards of right conduct. Nevertheless, I still think that Gluckman's normative use of the concept of a reasonable man has great value in understanding the nature of substantive standards in customary law. Furthermore, he has since refined the concept of the reasonable man to recognize this distinction. See *Id.* at 393 (2nd ed. 1967).

113. Cf. Kisumu DAC CC 484/66 (Jan. 6, 1967) (court believed plaintiff's evidence that defendant, at the funeral of her brother, accused plaintiff of having killed that brother, another brother, and a brother's son by witchcraft). But cf. Kisumu DAC CC 371/66 (Oct. 25, 1966) (first defendant, husband of deceased, alleged to have cried out accusations of witchcraft against plaintiff when he heard of death, but the court believed the evidence of defendants that they merely expressed their sorrow over the death).

114. See Whisson, *The School in Present Day Luo Society* 44, 47 (unpublished Ph.D. thesis, Cambridge, 1963): "Death, it was said, could not be wholly for natural causes. . . . Anyone with whom he [the deceased] had been in conflict might be cited as having been responsible for the death. . . . Death was caused by supernatural means and by the same means it should be avenged. The more important the man and his connections, the greater the number of explanations for his death and the wider the range of accusations would be. If the death was sudden and unexpected, more stories would be spread".

were there for the defendants to malign Augustino? He himself proffered none, and was forced to admit, in response to Atieno, that he and Ogalo had harboured no grudges against each other which could cause the defendants to suspect him. Nor, according to Atieno, did she bear Augustino any hatred which would lead her to accuse him falsely; she further contended that he had never entered her *boma*, and hence could not have stimulated a spontaneous accusation.

Although the court never spoke to this issue, an explanation of the defendants' motives is implicit in Augustino's allegation that he was called a *jadak* as well as a witch. A *jadak* is by definition an alien, a member of a foreign lineage; as such he is a potential enemy, viewed with considerable suspicion.[115] The defendants, themselves members of foreign natal clans by reason of the rules of exogamy,[116] also occupied somewhat insecure positions,[117] and thus had additional incentive to fix the blame on Augustino. Moreover, at least one of the defendants was the co-wife of Ogalo's mother, a relationship typically characterized by rivalry.[118] Misfortune suffered by the child of one wife is most commonly attributed to the jealousy of another,[119] in this case the defendant, unless a more suitable suspect can be found. This Augustino provided, not only as an outsider, but as the occupier of badly needed land. Central Nyanza, one of the most densely populated areas of Kenya,[120] suffers from a significant land shortage. By accusing Augustino, a *jadak*, of witchcraft, the women provided a ground for his subsequent expulsion by the local clan. Thus they sought to shift suspicion from themselves by appealing to the revanchist sentiments of their husband's group.[121] They may even have stood to benefit materially from the redistribution of Augustino's holdings, since they were his close neighbours. For this combination of reasons a *jadak*, often the object of witchcraft accusations, was a particularly suitable

115. "Distant clans were regarded as being close to enemies. In times of peace they were treated as foreigners and in case of invasion they fought with spears [rather than clubs]". Othieno-Ochieng', *op. cit. supra* note 99, at 4.

116. See Southall, *op. cit. supra* note 99, at 20; Wilson, *op. cit. supra* note 89, at 137.

117. See Southall, *op. cit. supra* note 99, at 22: "the groups with which marriage is possible tend to be those between whom hostility is the usual atittude. The Luo recognize this correlation, and regard *oche* (in-laws) and *wasigu* (enemies) as almost interchangeable terms. . . ."

118. *Id.* at 20.

119. See cases cited in Wilson, *op. cit. supra* note 100, at 191–92.

120. Three hundred and fifty-nine persons per square mile. This compares with a national density of 39. Nyanza Province is the most densely populated of the whole country. See *Kenya Census*, 1962, at 19, 20.

121. "[W]e find today in the overcrowded tribal areas considerable interlineage enmity about land." Evans-Pritchard, *op. cit. supra* note 104, at 38.

target here;[122] the court may well have considered this in ignoring Atieno's protestations that she lacked any motive to accuse Augustino.

Having found that the defendants did utter the insulting words in plaintiff's presence, the court next had to pass on possible defences. The defendants and their witnesses appear to have sought to convey the impression the Ogalo had actually died, for it was only on cross-examination that Atieno admitted that this did not in fact occur. Augustino clearly feared that the court might be deceived on this point, and conclude therefrom that the abuse was justified, for he took great pains to emphasize that Ogalo was still very much alive and missing from the village only because he was a fugitive from justice. However, the court was not misled and hence did not have to answer the very difficult question whether that death was caused by Augustino's witchcraft. Moreover, the court was never confronted with the less controversial issue, which was raised by the facts, whether a good faith or reasonable belief by the women that Augustino had killed Ogalo would constitute a defence. The defendants could not propose this argument because they refused to concede that they had accused Augustino and to plead the defence merely hypothesizing such a concession would probably appear to a legally unsophisticated court to constitute that very admission. Nevertheless, the reiteration in the testimony of defendants and defence witnesses that defendants did receive a letter warning of their son's imminent death, and did believe it to the extent of going straight to Sakwa to investigate (a journey of many hours) may be seen as an attempt to put forward evidence of at least a good faith belief in their son's death. In ignoring this belief as a possible defence, the court may have been following Augustino's implicit distinction between the precipitate, and thus unjustified, charges by the two women and their husband's more cautious reaction in organizing a careful investigation of the incident at Sakwa.

When viewed against the background of available ethnography this case report is a fertile source of hypotheses about law, though of course these must still be tested against numerous other disputes before general principles can be induced. Where a rule-directed inquiry might have produced an abstract statement of the wrong—"compensation is paid for abuse"—attention to the details of this case illuminates the social environment in which the wrong occurred. We learn that the "mothers" of a young man, hearing that he had been suddenly injured and might die,

122. It should not be thought, of course, that *jodak* are intentionally singled out for false accusations of witchcraft in general or by the defendants in this case. Rather, a functional interpretation of witchcraft requires not only that belief in the existence of supernatural phenomena be given an explanation in terms of social rather than physical phenomena, but also that the identities of accuser and accused be understood in the light of stresses in the social structure.

uttered witchcraft accusations against a near neighbour who is a *jadak*. Available remedies are not merely listed as fungible alternatives: counter-abuse, assault, arbitration, civil action for damages; the choice made under the circumstances of this case provides some data indicating when certain remedies are chosen, and why.[123] Existing biases cannot be dispelled by a mode of inquiry, but the case method does help to reveal them and thus avoid their consequences. An investigator working, perforce, with an elderly informant who reported only traditional conduct might never have learned of the wrong of insult even though it constitutes a substantial portion of the work of the primary courts.[124] On the other hand, the case lawyer is immediately alerted to the prestige accorded anything connected with English law by these courts. But this negative ethnocentrism, unlike the elder's blindness towards change, is a significant element of the contemporary legal system, and an analysis of the case reveals the precise extent of English influence: the language may be that of the common law, but the elements of the action are unmistakably indigenous. An interrogator might well have been too easily content with the discovery that his terminology—defamation—coincided with that of his informant to inquire further. Finally, the case suggested indigenous formulations of other legal rules, auxiliary to the general principle of compensation for abuse, which an investigator might not have thought to elicit nor an informant to volunteer. These were both evidentiary: how is conflicting testimony to be balanced, how is credibility to be tested; and substantive: what constitutes justification for abuse.

Wrongs are not only redressed by the payment of money compensation; other remedies are also significant. The following two cases illustrate how a husband employed the traditional remedy of witchcraft to control an unfaithful wife, and how she then sought protection from the primary courts by means of an action for divorce and a private prosecution for witchcraft. The participants are all Gusii.[125]

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123. See A. L. Epstein, "The Case Method in the Field of Law," in *The Craft of Social Anthropology* 205, 227–28 (Epstein ed. 1967): "the problem is not merely to distinguish and classify the various types of sanction, but to establish the relationship between them. In what kinds of situation is a particular kind of sanction likely to be invoked and why, indeed, within one social system are so many different kinds of redressive mechanism necessary?"

124. See Table IV in Part IV of this article.

125. The Gusii are a Bantu tribe which numbered just over 500,000 in 1962. See *Kenya Census*, 1962, at 36. They live in Kisii District (a European corruption of the tribal name), Nyanza Province, between the Luo on their west, and the Kipsigis and Masai on their north, east and south. Again, for reasons stated earlier, see note 83 *supra*, I have deleted the village and sub-locations of the parties, and replaced the names of parties and witnesses by what I hope are appropriate pseudonyms.

Plaintiff/Complainant: Agnes, Kitutu location, Kisii District
Defendant/Accused: Barnabas, Kitutu location, Kisii District

Case 1[126]

Claim: divorce (Filed August 24, 1966)

Plaintiff: Barnabas married me and we had good love. After I had stayed with him for three months they started to show me witchcraft documents. Barnabas' mother told me to listen to her but I refused. When the witchcraft exhibit was brought down from the house called *irongo* it was a skull in a basket. I went out of the house and started saying that I am not listening to them. Barnabas took my underwear and hid it. Then he told me he did not want me because I would not listen to him, and he chased me and said he would come and ask for his cattle. My father told him to wait until I remarried. When Barnabas chased me I stayed with my sister. Barnabas and three others came and took me by force; I agreed to go because he was my husband. When we reached his home he caught me and shaved my head and pubic hair and then they chased me. I did not sleep that day. I returned to my father and told him what they had done. (*Examined by Defendant*): You showed me witchcraft at midnight when you called me in your mother's house. There were two of you who shaved me at home. (*Examined by Court*): I cried out when they were shaving me but no one came because it was 7 p.m. and raining. The child does not belong to Barnabas because I was pregnant when I went to him. I stayed with him for eight months. They had some dried out skulls and some fresh heads.

Plaintiff's witness, Moseti: I agree that Agnes, my daughter, should divorce Barnabas. They showed her witchcraft documents (*ibinto biorogi*); he shaved her hair even on her private parts. Since I have been [alive ?] I have never seen people doing such practice. I asked Barnabas to go and bring the clothes which he took from my daughter, and the hair which he shaved off her. He took her young child from her but returned it after three days. (*Examined by Defendant*): My daughter's hair which you took was very long. You were three people when you shaved her. (*Examined by Court*): The child does not belong to Barnabas because when my daughter went to him she was pregnant.

Defendant: I do not want to divorce my wife. One day when I returned from school I found her missing. Then I heard that she had been taken by someone. I went to her father who said she was with her sister. I went there and took her home. But she left after one day, leaving her child behind. I sent my boy to take the child to her. (*Examined by Plaintiff*): I never helped my mother to bring down the basket which contains witchcraft documents.

126. Kisii DAC CC 342/66 (Oct. 5, 1966).

Judgment: It is very bad for a man to marry a girl and then show her witchcraft unknown to her parents. According to Kisii Law Panel Minutes 3(b)(1)[127] divorce shall be granted if one of the parties practices witchcraft. This was proved by the plaintiff who saw the witchcraft documents. The divorce is granted with [Shs. 66/-] costs. The defendant can claim the child in a civil suit.

Court: the case is adjourned a week. The defendant is to bring the clothes and hair which he took. He will be prosecuted for failure to comply. [A week later the defendant had failed to bring these articles and was prosecuted by the court.]

Case 2[128]

Charge: pretending to exercise witchcraft, contra section 2 of the Witchcraft Act.[129] (Filed September 6, 1966.)

Complainant: I was at my sister's home. The accused came and took me to his home. He was with two other men, Nyamao and Oroko. He took me on 2 September. He is my husband. He bought the men *pombe*.[130] After drinking the *pombe* the defendant caught hold of me while Omwayo shaved me. He shaved my head and my pubic hair. He shaved me with a pair of scissors. The accused kept the hair. The accused chased me that night at 10 p.m., after taking my child from me. I went to my home. After two days I came to charge him. He shaved me at 7 p.m. (*Examined by Accused*): You chased me at night after the other men left. (*Examined by Court*): You can see that my head is shaved. I did not tell anybody at the accused's house about this. I told my father. I accused him so that he may return my hair and knickers to me.

Complainant's witness, Makore: Agnes is my sister-in-law [wife's sister]. She had gone to visit me. After two days the accused came to collect her on 2 September. He took her away. At about 7 a.m.

127. Kisii Law Panel, Minutes of Meetings held at Kisii on Dec. 10–11, 1962, C, Law of Marriage; 7, Dissolution; A, Divorce; 3, Grounds; (*a*) by wife; (1) witchcraft (*Oborogi*). "A woman may divorce her husband if he is a witch as understood in the Kisii sense, or if he has been convicted of witchcraft under the Witchcraft Ord." See Cotran, *Restatement of African Law: Kenya*, vol. 1: *The Law of Marriage and Divorce* 69 (1968) [hereinafter cited as Cotran].

128. Kisii DAC CrC 1288/66 (Oct. 19, 1966).

129. Laws of Kenya, Cap. 67 (rev. ed. 1962): *Any person who holds himself out as a witch-doctor able to cause fear, annoyance or injury to another in mind, person or property, or who pretends to exercise any kind of supernatural power, witchcraft, sorcery or enchantment calculated to cause such fear . . . shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.* The Kisii District African Court, by its warrant, was not permitted to impose sentences of imprisonment exceeding 12 months.

130. Native beer (swahili).

the next day she returned to me. Her head was shaved. She told me that the accused and two other men had shaved her.

Complainant (*Re-examined by Court*): The accused said he did not want me, but that the hair was his cattle.

Accused: Agnes left my home on 25 July. I discovered this when I returned from school. She took her bedding and utensils. On 28 July she went and eloped [*sic*][131] another man, Mosigisi. I found her there. The man is here in court. Mosigisi wanted to fight me. They chased me. Agnes ran away and returned to her sister's. On 2 September I went and collected her. The next day at about 7.30 a.m. she left me and returned to her parents. She left the child behind. I did not shave my wife. (*Examined by Complainant*): You wanted to hit me with a piece of piping.

Accused's witness, Nyamao: We collected Agnes from her sister's. The next morning Barnabas told me that she had deserted (*Examined by Complainant*): We did not shave you. [Accused's witnesses, Oroko and Omwaya gave the same testimony as Nyamao.]

Judgment: When Agnes appeared before the court on 4 October her hair was quite short. Her sister's husband testified that her hair was shaven when he saw her on 3 September. The accused does not deny that Agnes was shaved. We have no doubt that she was shaved. She was deserting her husband. He took her back to him. It was on this evening that he shaved her head and private hair to frighten her so that she may not leave him. Agnes would be afraid of being bewitched by the accused if she left him. He would use her hair to bewitch her. This has been a practice with the Kisii husbands whose wives tried to desert them. This court can infer that this is the practice the accused employed to frighten his wife. We find him guilty.

Sentence: Shs. 40/- fine or two months' imprisonment, and to pay Shs. 16/- court fees to the complainant. [Barnabas paid the fine in full].

As in the Luo case the entire record, here of two inter-related controver-

131. African dialect usage of English verbs can sometimes be quite revealing about the nature of responsibility for the act described. The effect here is to transform the woman—in English a passive accomplice who "elopes with" a man—into a responsible agent who "elopes" the man. This is particularly remarkable in light of the fact that most dialect changes emphasize the active role of the man. In Kenya a man "wombs", "pregnants", or "conceives" a girl; proper usage would speak of a woman becoming pregnant, or conceiving. Similarly, in Kenya, a man "engages" a girl; in English she becomes engaged. These modifications may be a consequence of assimilating English to swahili grammar. In the latter, a man marries a woman (*ku-oa*, an active verb), but she is married by him (*ku-olewa*, a passive form); both men and women marry in English.

sies, must be analyzed as a whole. This time I will be less concerned with unravelling the reasoning of the court, which is plainly stated, and more intent to appreciate the legal tactics employed by each party to advance facts and imply interpretations favourable to his case. A brief chronology of events whose occurrence was not contested may be a useful preface to the wildly divergent stories told by husband and wife:

December 1965:	Barnabas and Agnes were married
July 25, 1966:	Agnes left Barnabas
August 24:	Agnes sued Barnabas for divorce
September 2:	Barnabas took Agnes from her sister's husband's home
September 3:	Agnes returned to her father
September 6:	Agnes filed a private prosecution against Barnabas under the Witchcraft Act
October 5:	Divorce granted
October 19:	Barnabas convicted under the Witchcraft Act

Agnes had no children at the time of her marriage to Barnabas, which itself suggests that she was quite young and that she had almost certainly not been married before. Gusii girls marry early, so that Agnes was probably no more than fifteen.[132] Nevertheless, she alleged that she had become pregnant before marriage. This may well have been true since pre-marital intercourse is common.[133] Indeed, her parents may have rushed her into the marriage in order to conceal such a pregnancy which could, if discovered, reduce the bridewealth they were expecting[134] and might have even more serious consequences if her lover were of her own exogamous group.[135] But whether or not the allegation was true it is surprising that Agnes should have made such an embarrassing admission in court, and even more so that her father should corroborate testimony apparently impugning his daughter's character. The most likely motive for the assertion was to establish that Barnabas was not the father of the child, and thus to defeat the right a man usually has upon divorce to the custody of children born to his wife during marriage.[136] Although Barnabas was clearly anxious to keep the child he did not challenge the allegation. Perhaps he was too preoccupied with avoiding the divorce and hoped that his wife's admission would constitute some

132. R. LeVine and B. LeVine, *Nyansongo: a Gusii Community in Kenya* 41 (1966) [hereinafter cited as *Nyansongo*]. A man is at least 18 to 20 when he marries—older if his father is poor and cannot afford the high bridewealth—which would make him considerably more mature; there is also some evidence that he was a schoolteacher, and thus educated and westernized.

133. *Ibid.*

134. P. Mayer, "Bridewealth Limitation among the Gusii," in *Two Studies in Applied Anthropology in Kenya* 19, 21 (1951).

135. *Id.* at 42–43.

136. P. Mayer, *Gusii Bridewealth Law and Custom* 57–58 (1950); cf. COR Appl. 5/53 (Dec. 11, 1953).

evidence of her promiscuous character, on which he planned to base the justification for the acts with which he was charged. His caution did no harm, for the court, following common practice,[137] deferred the issue of paternity to another case, recognizing that there were enough complications already.

Agnes conceded that she had lived happily with Barnabas for three months, but complained that he and his mother had then begun instructing her in the unnatural mysteries of witchcraft. When she tried to protect her innocence by refusing to listen he used his nefarious powers to threaten her, taking underwear which he could use to bewitch her.[138] Did any of this actually happen? LeVine, an anthropologist who spent two years in Gusiiland, observes that it is difficult to determine the empirical foundation of beliefs in witchcraft activities because witchcraft is almost never admitted by those accused, and rarely even discussed openly. His conclusion is:

> "there are some women who believe themselves witches and perform some of the acts customarily attributed to them. However, even if this is true of certain Gusii women, it seems obvious that the beliefs and images of the average Gusii concerning witches go far beyond the facts which can be empirically ascertained."[139]

Whether Agnes actually perceived the acts she described, or offered a naïve and fearful interpretation of ambiguous behaviour, or simply invented a fictitious story, there were substantial reasons why she should feel considerable hostility towards her husband and his mother, and why she should express it in terms of witchcraft. A girl's first months of marriage are a time of great strain. She has been uprooted from her home, family, and friends while still young, probably for the first time, and sent to live in a foreign clan (*eamate*) among people she has been brought up to regard as enemies.[140] There she is placed under the control of her

137. The approach of primary courts today contrasts strikingly with that of traditional councils of elders in this regard. In the past, any arbitration called to decide a single issue would quickly be expanded to consider all outstanding disputes between the parties and among their relatives in an effort to promote a more general and lasting settlement. Contemporary primary courts, because of their greater powers of enforcement, do not need to obtain the agreement of the litigants to the decision. Therefore, they seek to narrow the issue as far as possible so as to limit the evidence and facilitate decision. See, e.g., Kiambu Mag. CA 188/66 (Mar. 22, 1967), allowing appeal from Limuru AC CC 626/66 (n.d.). Plaintiff brought a claim for compensation for illegitimate pregnancy with respect to three children allegedly fathered by the defendant with plaintiff's daughter. He conceded that defendant had paid some bride-price, which defendant sought to raise as a set-off against the claim. The court nevertheless deferred this counterclaim to another case.

138. R. LeVine, "Witchcraft and Sorcery in a Gusii Community", in *Witchcraft and Sorcery in East Africa* 221, 228 (Middleton and Winters ed. 1963) [hereinafter cited as *Witchcraft*].

139. *Id.* at 229–30.

140. P. Mayer, *The Lineage Principle in Gusii Society* 10 (1949).

husband's mother, on whom she is dependent for food and in whose home she must cook and eat. Although she is treated courteously her insecurity is manifest in her eagerness to do household and agricultural chores so as to earn the approval of her new home.[141] Sexual relations with her husband are probably unhappy for he has consummated their marriage on the first night with a prodigious display of sadistic virility and continues to view coitus as an occasion for inflicting pain.[142] There are few outlets through which a newly married wife can express the hostility thus generated. Physical aggression is quite generally condemned in Gusii culture,[143] and unthinkable towards a husband or mother-in-law, whom a wife must treat with respect and obedience.[144] The same norms inhibit the display of aggression through abuse, though less strongly;[145] but vituperation is in any case an unrewarding weapon where one's audience is unfriendly and withholds its support.

Two alternative means remain to the Gusii wife to express her unhappiness. The first is an accusation of witchcraft. Although this would fall within the category of impermissible abuse if made before the general public,[146] it is privileged if made to an appropriate authority;[147] Agnes was careful here to confine her charges to the courts in which she brought her two actions. Gusii give recognition to the predicament of a young wife in their belief that such women are generally subjected to the lure of witchcraft by their mothers-in-law. Instruction in witchcraft partakes

141. *Nyansongo* 51–52.

142. *Id.* at 47–48, 54, 191.

143. *Id.* at 156–57.

144. *Id.* at 21–23, 51–52.

145. *Id.* at 157.

146. See Kisii DAC CC 64/66 (Feb. 14, 1966) (Shs. 100/- compensation awarded against defendant on his admission that he had called plaintiff a witch who had killed his child). But see Kisii DAC CC 47/66 (Mar. 16, 1966) (plaintiff alleged that defendant had called her an adulteress, and claimed Shs. 200/- compensation; the court dismissed her claim as based on mere vulgar abuse uttered during a quarrel).

147. See Kisii DAC CC 87/66 (Oct. 19, 1966). The defendant here believed that plaintiff had killed one of his children by witchcraft, and that two others were threatened with a similar fate. He reported this to the sub-chief, and repeated the charge at public meetings called by the sub-chief, at which plaintiff refused to appear. The court dismissed plaintiff's claim of Shs. 400/-, stating: "The sub-chief is a government servant who, when he receives a report of anything, is under a duty to investigate . . . when the defendant's three children died [*sic*] he suspected that man [the plaintiff] and reported to the sub-chief. The sub-chief summoned the parties and investigated. Then the two other children of defendant, who were seriously ill, recovered. This is no defamation of name. For example, if the defendant could go and announce this matter where there were many people and not including the sub-chief, the court might think that the defendant defamed plaintiff's name. But on this we have found that the defendant did not use the name of plaintiff in a bad way". LeVine notes that appeal to authority as the preferred means of dispute settlement is an integral part of the Gusii personality structure. *Nyansongo* at 186.

of all the horror of the practice itself. Gusii assert that it is difficult to resist an invitation to learn, and that to interrupt tutelage once begun may lead to illness or insanity. Yet to attain the status of a witch is even more terrible, for a novice is required to sacrifice her own child to the greed of her fellow-witches, and ultimately gains her infernal powers only at the expense of all friendship and respect in the community.[148] Agnes' accusation of her mother-in-law was thus culturally sanctioned. Her accusation of Barnabas followed naturally, for a witch is even more successful in seducing her own children to the craft than she is in enticing her daughters-in-law.[149] These allegations also laid the foundation for the other, more total solution to the conflicts in Agnes' position, to which she was later driven, namely divorce.[150]

Not only did Agnes' description of her marital discord tally with Gusii conceptions about the early course of marriage, but the details in her recitation of the witchcraft practices of her affines—the midnight tryst, a basket containing fresh heads and dried out skulls—also coincided with the ascribed behaviour of such persons.[151] Indeed, Agnes appeared to rely on the arche-typicality of this part of her story to convince the court, since she offered little other persuasive evidence. Her father's testimony about the "witchcraft documents", like his confirmation that Barnabas had taken Agnes' underwear, could clearly be no more than hearsay repetition of Agnes' own story. She also failed to call the only eye-witness, Barnabas' mother. Even so, her father's support for charges of witchcraft likely to result in a divorce, to which he would normally be opposed, did carry some weight. And she could draw upon the later threats of witchcraft, for which there was considerable evidence, to lend credence to this earlier incident. In offering all this testimony Agnes' primary intent was to portray herself as an innocent dutiful wife, tormented without provocation by husband and mother-in-law even to the point of being seduced into and threatened with witchcraft.

This was not at all the gloss put upon events by Barnabas. His testimony, questions and witnesses tended to show Agnes as a disobedient, unfaithful wife and himself as the indulgent, forgiving husband. Her accusations of witchcraft were simply a fabrication intended to justify a divorce and leave her free to chase other men. Barnabas could find some evidence that the allegations had been concocted as a justification after the fact

148. *Witchcraft* at 229.

149. *Id.* at 228.

150. Divorce is quite common during the first year of marriage, which is viewed as a trial period. A wife generally visits her parents within the first three months, and often tries to persuade them then not to send her back to her husband. *Nyansongo* at 49; P. Mayer, *Gusii Bridewealth Law and Custom* 50–51 (1950).

151. *Witchcraft* at 226–28.

in Agnes' delay in making them: she remained with him five months after learning about the witchcraft, and waited yet another month after deserting before suing for divorce. At the same time, Barnabas did not unequivocally deny these charges. Though he disavowed participation in his mother's midnight witchcraft practices he did not deny that they occurred. Perhaps he feared to diminish the force of his argument by opposing such a widely held belief that women teach their daughters-in-law witchcraft; moreover, his mother's character by itself could not sustain a divorce or penal sanctions. But this cannot explain his failure to controvert his wife's allegation that he had taken her underwear. The contrast between Barnabas' outright denial of any part in the first witchcraft incident and his admission by default of the second suggests that there might have been a distinction in his mind, which he was trying to imply to the court, between unmotivated, purely malicious witchcraft, and the justified use of witchcraft. If he had taken Agnes' underwear it was not to coerce her into becoming a witch but to deter her from adultery and desertion. In support of this construction Barnabas offered persuasive evidence that Agnes had not been driven from his home but had run away voluntarily. She had left in his absence and had taken all her belongings, something which no husband would allow[152] and which indicated that she did not intend to return. Barnabas had gone to her father to ask her to come back only to learn she was not there but had, after an indecently short time, gone to live with another man. This couple were now so morally depraved that when Barnabas went to demand his wife both of them violated fundamental Gusii norms, Mosigisi offering a fight and Agnes threatening her own husband with a piece of pipe.

Agnes, naturally, did not allow this story to stand unchallenged. She had not run away, though the presence and threats of witchcraft might well be reason to do so. It was her husband who had told her to leave because she would not become a witch. He had further asserted that he would reclaim his bridewealth cattle, and after driving her away had visited her father for this sole purpose. Her father could hardly compel her to remain with such a man and agreed to the divorce which Barnabas had demanded.

Although an unqualified choice cannot be made between the competing interpretations, the evidence on balance appears to support Barnabas. Agnes must have left voluntarily, without her husband's knowledge, since she did not deny taking her belongings. Moreover, had he chased

152. See, e.g., Kisii DAC CC 3/66 (June 17, 1966). Plaintiff sued defendant for taking certain clothing. Defendant admitted doing so; he had eloped with plaintiff's sister and when the girl left him she had stolen the clothing, which he had gone and taken back. See also Kisii DAC CC 131/66 (May 9, 1966). Plantiff here sued the sons of his former wife for assisting her in taking her goods when she deserted him one night.

her, he would not have followed her to her father's after only three days. There is good reason to believe that she had formed an attachment with another man, either prior to her departure or shortly thereafter. She seems in fact to have been living with him, since she was not at her father's, and her allegation that she stayed with her sister was contradicted by her sister's husband, who testified that she had been there only two days when her husband recovered her. While living with this man she sued her husband for divorce. Though most Gusii fathers would try to preserve a daughter's marriage[153] so as to retain the brideprice, Moseti advocated a divorce. He may well have been motivated principally by a genuine fear for his daughter's safety, but this sentiment by itself would probably not have been sufficient to overcome pecuniary considerations without the expectation of a second brideprice.[154]

Why, then, did Barnabas not make a more determined effort to prove Agnes' adultery with this man, thereby justifying himself? Why did he fail to call Mosigisi as a witness since he claimed that Mosigisi was actually present in court? The reason lies in the legal dilemma in which Barnabas found himself. He wanted to keep his wife, and yet any defence he made to her charges could lead the court to grant the divorce. If he argued that Agnes had left him for Mosigisi then the court might reason, as it in fact did, that Barnabas had chosen the response of a typical Gusii husband and threatened his wife with witchcraft. The court might then dismiss Agnes' story of the pot of skulls, but would still find grounds for divorce in Barnabas' threat to use his wife's underwear to bewitch her. If Barnabas concealed his suspicions of adultery, then the most probable cause of her desertion was that he and his mother were witches. Were this to be believed, Barnabas would not only lose Agnes, but find it nearly impossible to obtain another wife.[155] And if Barnabas successfully convinced the court that Agnes had had no reason to leave, it might conclude that he had chased her away, another adequate ground for

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153. *Nyansongo* at 49.

154. Brideprice or bridewealth is a transfer of property from the family of the groom to the family of the bride which, among the Gusii, is essential to the validity of the marriage and necessary to establish a man's rights to his wife's children. In 1951 the amount was 12–16 cows, one bull and 12–18 goats. P. Mayer, "Bridewealth Limitation among the Gusii", in *Two Studies in Applied Anthropology in Kenya* 19, 25 (1951). The assurance of another suitor for Agnes meant at least that Moseti would suffer no loss from the divorce. He might even have anticipated a gain, for Mosigisi may have been prepared to pay a higher amount than Barnabas has given. In any case, Moseti would have had the temporary use of two brideprices and might, like many Gusii fathers, delay considerably before completing the return of the first. See *Nyansongo* at 49.

155. *Nyansongo* at 45–46.

divorce.[156] Barnabas compromised with this problem by offering a weak presentation of all three possibilities. Agnes too, was in an ambiguous situation. If she insisted on her moral purity, then the only evidence of witchcraft was her uncorroborated testimony of the midnight ceremony. If she admitted that her husband's use of witchcraft was motivated by her own unfaithfulness, then the court might disregard her whole complaint as the fabrication of an adulteress seeking the freedom to run after other men. Agnes chose to maintain her own innocence; fortunately, the court did not believe her.

When Agnes left Barnabas, he followed her to her father after a few days, seeking an early reconciliation. But upon learning that she had gone to live with another man he took no immediate further action, obeying Gusii norms which urged that he avoid a confrontation that could only lead to an open conflict.[157] Time might work a solution, and Agnes might return to him on her own. Notice that she had filed an action for divorce showed this hope to be vain. Threatened with the permanent loss of his wife, he surprised the couple and in a heated controversy succeeded in driving Agnes away from Mosigisi. He traced Agnes to her father and then to her sister's husband and took her back to his home. However, harmony could not be re-established, and she left him again.

The versions which the litigants gave of the events of the night of September 2-3 were consistent with the legal strategies each had adopted. Agnes alleged, with apparent inconsistency, both that she went with her husband voluntarily and that he and two other men took her by force. Either situation could be turned to her advantage: the former to show her as the obedient wife, the latter to dramatize her husband's wrongful intentions. After the men had drunk beer to nerve themselves her husband held her while his brother shaved her. Then the other men left; her husband took the child from her and drove her out into the night. Barnabas admitted that he had brought his wife home, but not that he had shaved her. She had persisted in her disobedience and had run away again the next morning, abandoning her child, which he voluntarily returned three days later.

Agnes' evidence was considerably more persuasive. First, there was the indisputable fact that her head had been shaved. The court could see this for itself, and indeed commented on her short hair. Real evidence

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156. See Kisii Law Panel, *op. cit. supra* note 127, at C.7.A.3.b.4.

157. *Nyansongo* at 76–78: "unsociability . . . is itself a reaction to aggression, and the preferred method of handling it."

often has a disproportionate effect in primary courts:[158] for instance, cattle trespass may be proved by producing a broken maize plant, or an assault by the rock alleged to have been thrown. The shaving was also corroborated by witnesses; not only Agnes' father, who could be expected to lie in her behalf, but also her sister's husband, member of another lineage and hence less biased who in addition had seen Agnes just before and after the incident. All that remained was a link between Barnabas and the shaving, which the court itself was able to deduce from circumstantial evidence combined with its knowledge of the modal behaviour of Gusii husbands. Second, it was clear that Agnes had been driven away by Barnabas that same night. There were no eye-witnesses, since his brother and friends had already left, but again circumstantial evidence was conclusive. That her departure had occurred at night was confirmed by her brother-in-law, Makore, who testified that she arrived at his home at an hour which would have required her to travel during the night. Gusii are extremely fearful of being out alone at night, when wtiches are omnipresent.[159] Agnes would not have ventured to do so voluntarily under normal circumstances; the coercion must have been considerable for her to brave the dark immediately after being threatened with witchcraft. Furthermore, Agnes left her infant child behind; few mothers would do so freely, and none would willingly entrust her baby to a man she believed to be a witch.[160] Barnabas' answer was extremely feeble. He did not even attempt to deny that his

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158. See, e.g., Kisii DAC CC 103/66 (May 17, 1966); Kisii DAC CC 39/66 (Feb. 4, 1966). In the first case plaintiff claimed compensation for bedding and clothing which he alleged defendant's cattle had eaten. He produced in court the remains of a blanket and sheet, and stated that another blanket and two shirts had been entirely consumed. The court allowed damages only for the articles shown to it, stating: "We cannot assume that the same cattle had eaten the [other] blanket and shirts". In the second case, plaintiff sued defendant for assault, seeking compensation for a torn shirt and vest. He testified that his wife had used the shirt to make clothing for his children. The court dismissed the action, stating: "Although he [plaintiff] alleged that his shirt was torn, he did not produce the shirt itself, but he showed a shirt of his child which had been sewn by his wife from that which had been torn". See also Tononoka AC CC 180/66 (Oct. 10, 1966). Plaintiff sued defendant for assault, claiming that defendant had bit off part of her ear. She produced the piece in court, which clearly impressed the judges, who stated: "Since the ear was normal before the fight and it is not shown that it was injured apart from the fight, the court finds that defendant did bite it. The court has examined the ear and found that a portion is bit off". The real evidence here appears to have shifted the burden of proof from plaintiff to defendant.

159. *Nyansongo* at 146; *Witchcraft* at 226.

160. The attachment between a mother and child is very strong, and mothers generally make vigorous efforts to retain their children upon divorce, as shown by the number of appeals dealing with this issue which reach the highest court. See, e.g., COR Appl. 4/53 (Dec. 10, 1953); COR Appl. 5/53 (Dec. 11, 1953).

wife had been shaved. His bare disavowal of personal responsibility was merely reiterated by his alleged accomplices, all of which testimony was suspect as being self-exculpatory. The allegation that Agnes had deserted the following morning could not even draw upon such self-serving declarations; his witnesses only repeated what Barnabas himself had told them.

The motivation and significance of an act is inevitably more ambiguous than the act itself, but the evidence available here does permit an interpretation of the events of this case, based on the above reconstruction. Barnabas took his wife home on September 2 impelled by a complex of conflicting emotions: he sought to reassert his authority, challenged by her elopement with Mosigisi; to punish her disobedience; and to frighten her into future submission. His ultimate aim was reconciliation, a return to the "good love" they had had originally. Agnes' willingness to accompany him must have encouraged this hope. But his strategy backfired, frightening Agnes into revulsion rather than submission. Threat and repulsion fed on each other until Barnabas was driven to employ a technique which, past experience suggested, would terrify her. He shaved her hair and kept the shavings, exuviae traditionally capable of being used to bewitch the person from whom they come.[161] This was the most potent means he possessed to retain his wife. In addition, the act had symbolic value. As the court observed, such shaving is a practice among Gusii husbands. A woman with a shaved head would be publically branded by the Gusii equivalent of a "scarlet letter" as a disobedient wife and suspected adultress. The same construction could be expressed by another symbolic route. 1. A woman who has committed adultery must acknowledge the error to her husband in order that she may be purified before she sleeps with him again; failure to do so may cause his death.[162] 2. The head of a widow is shaved.[163] Agnes' bald head may thus have stigmatized her as a prospective widow, a woman who had sought to kill her husband by willful refusal to admit her adultery. Shaving Agnes pubic hair, however, was an act without traditional precedent. Even her father testified with horror that he had never heard of such a practice. I can find no direct explanation in the ethnographic literature

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161. *Witchcraft* at 128.

162. *Nyansongo* at 100–01. In Kisii DAC CC 47/66 (Mar. 16, 1966) plaintiff sued defendant for defamation alleging that defendant had accused her of committing adultery, and thereby killing her husband through supernatural means. The court accepted that this accusation of *amasangia* was recognized by Gusii belief, but found that plaintiff had not proved that the accusation had been made.

163. *Nyansongo* at 94.

with which I am familiar.[164] Analogies with the shaving of her head and with the retention of her underwear suggest strongly that these cuttings too were to be used to threaten witchcraft more specifically contingent upon a recurrence of adultery.

Barnabas himself indicated an additional symbolism of the shaved hair: it was his cattle and represented the return of bridewealth. Yet despite this implicit act of divorce Barnabas' efforts were consistently directed at keeping his wife. Even when she was driven by his behaviour and threats to seek protection from her relatives he retained her child in the hope of enticing her back. Only when Agnes prosecuted him for witchcraft did he begin to perceive that strong-arm tactics produced terror, not respect. Then he surrendered the child, fearing that his custody might be construed as one more attempt to threaten its mother, and further that any misfortune to the delicate infant would constitute ultimate proof of his witchcraft.

For Agnes to bring a private prosecution against her husband under the Witchcraft Act was a highly unusual step for several reasons. First, the practice of witchcraft is commonly dealt with by traditional, extra-legal methods; only the circumstances of this case rendered these procedures inappropriate. In the past, when a community had been able to reach agreement on the guilt of a witch, it might act together to kill him or drive him away.[165] But today resort to self-help is illegal, and consequently increasingly rare.[166] Moreover, a woman who married into the village from a foreign lineage could never instigate such action against her own husband. Agnes could have obtained the assistance of certain quasi-legal specialists in anti-witchcraft medicine: the sorcerer (*omonyamosira*) who kills the witch by magic, or the witch-smeller (*omoriori*) who discovers and removes witchcraft substances.[167] Yet such men were impotent here, since Barnabas had subjected his wife to the threat of witchcraft, but had

164. One incident, however, is suggestive. As mentioned earlier, sexual relations among the Gusii are permeated by aggression. Not only does a man seek to inflict pain during intercourse, a wife generally tries to avoid intercourse, and in particular attempts to frustrate it on her wedding night. LeVine tells of a girl who was found to have knotted her pubic hair so that her husband was unable to achieve penetration for a week, until this was discovered and the hair cut with a razor blade. *Nyansongo* at 48. Assuming that Barnabas and Agnes had not escaped the endemic sexual conflict, shaving Agnes' pubic hair may have been another expression of sexual hostility, perhaps symbolic of her accessibility to other men. The presence of Barnabas' brother and friends was also a means of shaming Agnes, for Gusii women are generally extremely modest. *Nyansongo* at 142-43, 170-72.

165. See South Nyanza District Law Panel, Kisii Section. Minutes of a Meeting held on December 12–14, 1950, No. 38. "Any person convicted of causing the death of [persons] by means of witchcraft was polted [*sic*] or stoned by a crowd of his relatives until he was dead". See also *Witchcraft* at 231.

166. *Nyansongo* at 83.

167. *Witchcraft* at 233–39.

not yet exercised his powers. Second, the easiest and most effective way for a wife to protect herself against affines she believed were bewitching her was desertion and divorce. But pursuit of this remedy had only infuriated her husband, driving him to increase his threats and thus aggravating her terrors rather than relieving them. Third, married women do not frequently resort to the courts,[168] and almost never sue their husbands, except for divorce.[169] But Agnes' legal representative under ordinary circumstances, her husband, was of course disqualified. In marital disputes a woman's agnatic kin may conduct an informal arbitration with her affines; Agnes' father, on at least two occasions, did seek to persuade Barnabas to abandon his threats. But persuasion was ineffective, and a court action can only be initiated by the person wronged. Finally, the Witchcraft Act is itself an unsatisfactory compromise between English scepticism about witchcraft and African demands that it be controlled.[170] Only the pretense of possessing or using witchcraft to cause fear, annoyance or injury is punished, not the possession or practice itself. Yet it was precisely this pretense that Agnes wanted terminated. She was not concerned to punish her tormentors for she accused only Barnabas, who had custody of the materials used to frighten her, but not his equally culpable accomplices. Rather, she prosecuted her husband for the same reason that she sought to divorce him, "so that he may return my hair and knickers to me." It is ironic that the inadequacy of

168. See Table I in Part IV of this article.

169. Women do sometimes sue their husbands for assault, but only when divorce is pending or has been granted. See, e.g., Kisii DAC CC 13/66 (Feb. 8, 1966); cf. Kiambu Mag. CA 117/65 (July 5, 1967), dismissing appeal from Githunguri AC CC 330/64 (June 22, 1964) (Kikuyu). A divorced woman may also sue her former husband for the return of property which he has retained. In Kisii DAC CC 193/66 (June 30, 1966) plaintiff claimed that she had been "eloped" by defendant, and then sent away by him four months later. She sued for the value of her labour during the time she was living with him. The court rejected her claim as contrary to customary law.

170. Very few prosecutions are brought under the Act. In 1966 there were only 464 in all of Kenya, or a mere .2 per cent of all criminal cases. Convictions are difficult to secure. See, e.g., Kisii DAC CrC 1313/66 (Sept. 20, 1966) (accused acquitted because the prosecution failed to prove the three essential ingredients of the offence under Section 5: the articles must be ones usually used in the exercise of witchcraft; they must be carried for the purpose of causing fear or annoyance; the accused must have them without reasonable excuse. The accused here claimed that the medicine was for his own protection against devils). Even when the accused is proved guilty sentences are relatively light. See, e.g., Kisii DAC CrC 1029/66 (July 21, 1966) (Shs. 150/- fine or three months imprisonment); Kisii DAC CrC 1006/66 (July 26, 1966) (Shs. 30/- fine or one month extra-mural penal employment; charms to be destroyed). This attitude is in sharp contrast with the concern which Africans demonstrate about witchcraft in the numerous defamation cases which concern such accusations. See, e.g., Kisii DAC CC 298/66 (Sept. 13, 1966) (claim of Shs. 200/- compensation for being called a witch); Kisii DAC CC 241/66 (July 21, 1966) (claim of Shs. 200/- for being called a witch).

traditional remedies against this form of witchcraft compelled Agnes to turn for protection to the 'agnostic' state which had the power to do just this.[171]

The court encountered little difficulty in reaching a decision on the basis of the evidence presented in these two cases. Any ambiguities in Barnabas behaviour were resolved by his shaving of Agnes, which unmistakably identified his entire course of conduct with the common Gusii syndrome of husbands using witchcraft to control unfaithful wives.[172] Consequently, the court's examination of Agnes and her witnesses was most perfunctory. It was easily satisfied with her responses to questions of fact; there could be little doubt that the possibility of informal reconciliation had been exhausted; the issue of custody was postponed to another case. Even though Barnabas had voluntarily testified under oath,[173] his statements were so little worthy of credence that the court would not even take the effort to question him. Nor did Barnabas exert himself greatly on his own behalf; he failed to bring any witnesses in the divorce case. To the extent that he was relying on Agnes' adultery to justify his resort to witchcraft, his hopes were vain. Adultery was certainly wrong, but a husband has other remedies: he could chastise his wife by beating,[174] he could claim compensation from her father for the adultery,[175] he could prosecute her paramour[176] or sue him civilly for the return of

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171. Witchcraft Act, Laws of Kenya, Cap. 67, s.5 (rev. ed. 1962): *the charm or other article* [usually used in the exercise of witchcraft for the purpose of causing fear] *shall be fortfeited and destroyed or otherwise dealt with in such a way as the magistrate may direct.*

172. As in the Luo case, this court's perception that Gusii husbands use witchcraft to control errant wives was a statement about modal, not normative behaviour; it was not a statement of what the "reasonable" Gusii does, or should do. Cf. note 87, *supra.*

173. The accused may elect to give a sworn statement, in which case he is subject to cross-examination; or an unsworn statement, in which case he is not; or no statement at all. See Criminal Procedure Rules for African Courts, s.50 (n.d.).

174. *Nyansongo* at 22.

175. The wife's father was liable to pay compensation of a cow worth Shs. 200/- and to provide a goat worth Shs. 30/- to cleanse his daughter. See Kisii District Law Panel, Special Meeting to Record Customary Criminal Offences, s.1 (Aug. 16, 1961).

176. *Id.* ss.1–2. Both adultery and removing a married woman without the consent of her husband were customary offences for which the penalty was a fine of up to Shs. 500/- and/or imprisonment of up to six months. See, e g., Kisii DAC CrC 117/66 (Feb. 23, 1966) (Shs. 350/- fine or four months' imprisonment for removing married woman). See also Cotran, *Report on Customary Criminal Offences in Kenya*, Appendix A at 10 (n.d.) (cyclostyled; copy in possession of author). These offences were abolished as of July 1, 1966. See reference cited note 19, *supra.*

the woman,[177] or in the end he could divorce her.[178] That witchcraft had traditionally been used by Gusii husbands in such circumstances did not legalize the practice. Witchcraft was far too extreme a response to this kind of misbehaviour, and was in any case now illegal.

Having concluded that Barnabas had employed witchcraft threats, the court still had to determine the proper remedy. Since witchcraft has always been sufficient ground for divorce, Agnes' first plea clearly had to be granted. Moreover, divorce is almost never refused when it has the support of a girl's father. Moseti's advocacy of his daughter's cause may have served a selfish motive, but his eloquence clearly showed that he honestly shared her fear that she would be bewitched and was seeking to protect her. To award the divorce, however, did not itself secure that protection. The court therefore accompanied its decree with an order that Barnabas relinquish the materials by means of which he wielded his unlawful power. In doing so it hoped to avoid recourse to penal sanctions which could only intensify Barnabas' anger and resentment, and thus augment rather than mitigate Agnes' danger. But this command merely placed Barnabas in a further legal dilemma: if he defied the court's mandate he risked the penalties of the law; if he surrendered Agnes' clothing and hair he stood confessed as a witch. The severity of social sanctions against witches apparently proved more fearsome than punishment for contempt, even when contempt made inevitable a conviction in the criminal case. Thus, in effect, the traditional power of a husband to discipline an unfaithful wife by witchcraft was preserved, in defiance of courts and modern law, at a relatively small price.

The substantive law for which this case stands can be stated very simply: a husband who threatens his wife with witchcraft may be divorced by her, and may also be fined Shs. 40/-. The rule could easily have been elicited from any informant. But I hope my analysis has shown that a great deal more can be learned from the case. First, the genesis of the dispute is discovered in the strains inherent in the early stages of Gusii marriage. Second, the choice of a means for expressing this conflict is illuminated. A young wife is deprived of most outlets for her hostility, and hence must speak through the language of witchcraft to justify her desertion and lay the foundation for a divorce. Moreover, she must

177. See, e g., Kisii DAC CC 327/66 (Sept. 7, 1966) (plaintiff claimed for and received his wife from the defendant). The husband may also claim for the expenses he incurred in tracing and retrieving his wife. See Kisii District Law Panel, *op. cit. supra* note 175, s.2. Those criminal cases which were pending on July 1 1966 were often transformed into civil claims for the return of a wife. See, e g., Kisii DAC CC 280/66 (Nov. 25, 1966), transferred from Kisii DAC CrC 692/66 (originally filed on May 17, 1966). See Cotran at 68. See also note 71, *supra*.

178. Kisii Law Panel, Minutes of Meetings held at Kisii, Dec. 10–11, 1962, C.7.A.3.a.(3) Habitual adultery (*obutomami*). See Cotran at 70.

address the appropriate authority—here the courts—and hence is constrained by the form of colonial legislation. Thirdly, once the parties are in court the judicial process is seen to be more than the mere mechanical application of rules to a clearly perceived factual situation.[179] The evidence is too inconclusive for this. Although Agnes had the benefit of the real evidence of her shaved head, Barnabas could point to the absence of eye-witness testimony. In the end both litigants and court had to rely on perceptions of modal behaviour to resolve conflicts in the circumstantial evidence—creating inferences of fact, colouring actual incidents, and discrediting inconsistent testimony. Thus Barnabas could suggest that, when an absconding wife takes her belongings with her, she has probably deserted voluntarily. But Agnes could reply that when she runs off into the night leaving her infant behind she has certainly been driven away. The court could accept both propositions, finding that when a woman does desert, with the connivance of her father, there is likely to be another prospective suitor involved; and that Gusii husbands have in the past been driven by jealousy to resort to witchcraft to control errant wives. Finally, the product of these evidentiary principles—the judgment—must itself be subjected to scrutiny, for it is seen that though Agnes had the benefit of the court's decision in each case, both judgments were ineffective to counteract the threat of witchcraft. The skeleton of substance—the anatomy of the law—is thus fleshed out with an understanding of how that skeleton functions in the settlement of disputes—the physiology of law.[180]

IV. Lower Courts

An examination of cases in depth, such as that presented in the first part of this article, permits valuable insight into the process of dispute settlement in the primary courts. For example, witchcraft disputes frequently reach the courts in the form of an action for damages for being called a witch—as in the Luo case—but only rarely does the victim of witchcraft seek to penalize the practitioner himself[181]— as in the Gusii

179. Cf. Epstein, *op. cit. supra* note 123, at 212: "few disputes centre upon the application of a single unequivocal rule, and the more usual content of a dispute is a dialogue of norm and counter-norm".

180. Cf. Radcliffe-Brown, "On Social Structure", 70 J. Roy. Anthrop. Inst. (1940), reprinted in *Structure and Function in Primitive Society* 188, 195 (1962):

> "Besides this morphological study, consisting in the definition, comparison and classification of diverse structural systems, there is a physiological study. The problem here is: How do structural systems persist? What are the mechanisms which maintain a network of social relations in existence, and how do they work?"

181. The only tribe in Kenya which to my knowledge uses the legal process extensively to identify and denominate witches is the Taita. In the Taita District African Court at Wundanyi there is a unique series of cases in which the plaintiff sues the defendant for having bewitched him, seeking a declaration that the defendant is a witch. If the court finds sufficient evidence to support the charge it will order the plaintiff to provide a goat for slaughter so that the entrails may be examined by a traditional diviner. If the charge is confirmed the defendant will be ordered to repay to plaintiff the goat (worth Shs. 20/-) and Shs. 20/- court costs. See, e.g., Taita D.A.C. C.C. 222/66 (Sept. 26, 1966).

case. Consequently, intensive study of a sample of cases must be supplemented by statistical analysis of the entire body of litigation heard by each court.[182] This cannot be performed accurately by means of case files alone, for few courts possess a complete set: cases awaiting appeal are filed with the appellate court;[183] others, in which there has been a final decision, may still be unavailable for reference until the judgment has been fully satisfied, often a matter of years. However, each court also maintains separate civil and criminal registers[184] listing every case initiated and describing its progress through the primary court. Together, these sources provide essential statistics which may be analyzed to create a reasonably exact and comprehensive picture of the activity of litigants and courts. The following information is available about civil litigation:[185]

1. Names of the parties.
2. Residence of the parties, by village, sub-location (or sub-chief), and location.
3. Religion of the parties. The court must determine this in order to swear in a party, or any other witness, before he testifies, and will

182. Anthropologists have increasingly come to recognize the need to provide some statistical data for the representativeness of their assertions. Gluckman, for instance, has argued that "the mode of presenting ethnographic material through the combination of quantitative statements and extended cases is important not only in terms of fieldwork technique, but also because it will enable us to cope better with certain developments on the theoretical side of the science." "Introduction" to *The Craft of Social Anthropology* xi, xvii (A. L. Epstein ed. 1967). See generally Van Velsen, "The Extended-case Method and Situational Analysis," in *Id.* at 129. See also Goody, " 'Normative,' 'Recollected,' and 'Actual' Marriage Payments among the LoWiili of Northern Ghana, 1951-1966," 39 Africa 54 (1969).

A similar technique has previously been used by Laura Nader in Mexico, see "An Analysis of Zapotec Law Cases," 3 Ethnology 404 (1964), reprinted in Law and Warfare 117 (Bohannan ed. 1967), and Lloyd Fallers in Uganda, see *Law Without Precedent* (1969).

183. African Courts Officer, Circular No. 1 of 1963: Disposal of Case Files and Suits in Forma Pauperis (Jan. 25, 1963). "When a case has been finally decided or when the period allowed for appeal has expired the whole case file will be deposited in the highest court which has passed judgment in the case."

184. See, e.g., Colony and Protectorate of Kenya, Standing Orders for African Courts, s. 204 (1959). Additional registers are kept for disputes concerning title to land, prosecutions for non-payment of the Graduated Personal Tax, and actions for maintenance under the Affiliation Act. With the exception of the last, these registers have generally been maintained for the past 30 years and, though often limited in content, offer the most promising source for historical studies of the development of customary law during the colonial era.

185. Data described within brackets is contained in the case files; other information will be found in the registers. Comparable data is available concerning criminal prosecutions. However, because the pervasive influence of legislative enactments has relegated customary law to a subsidiary role in this area, I only analyzed the work of the Kiambu (Kikuyu) and Machakos (Kamba) courts in 1966.

usually note it in the case file. However, such religious affiliation (Christian, Moslem, pagan) is often quite nominal and must be used with care.

4. Occupation of the parties. Some courts will ask this, and note the answer at the beginning of the party's testimony.

5. Sex of the parties. This is usually clear from the name; (if not, most courts note it at the beginning of the record of testimony).

6. Literacy of the parties. A rough estimate of this may be obtained when a party is required either to sign his name, or give a thumbprint. However, there may be literate individuals too embarrassed to sign, and illiterates who can write their names. A successful plaintiff will be asked to acknowledge the receipt of money paid into court in satisfaction of the judgment. (Both parties are required to acknowledge their testimony.)

7. Cause of action, and the amount of money, or other relief claimed. This is always stated in the register (and in the case file).

8. Judgment, including *ex parte* judgments, whether or not these are subsequently set aside. These are contained in the register and case file.

9. Court costs. Each fee, its purpose, and the date paid, is always stated in the register (and may be repeated in the case file).

10. Chronology.
    (*a*) The date of the incident. This can usually be found in the course of the testimony.
    (*b*) Filing date. This is always contained in the register (and case file).
    (*c*) Judgment date. Same.
    (*d*) Dates of motions in furtherance of execution (*e.g.*, interrogation of a judgment debtor, attachment warrant). Same.
    (*e*) Dates of payments made in satisfaction of judgment. Same.

Analysis of this data can illuminate four distinct facets of the legal process: (*a*) to what extent do different groups use the primary courts; (*b*) what are the characteristics of litigants; (*c*) what kinds of claims do they make; (*d*) how does the judicial process dispose of those claims. I cannot give a full presentation of such an analysis, nor would it be appropriate in an article concerned primarily with methodology. What follows

are some partial and tentative results, offered as examples of what can be done.[186]

(*a*) The relative litigiousness of different groups can be estimated by comparing population statistics[187] with the annual total of customary cases[188] to obtain a ratio of the number of persons for whom there is one case filed a year. Although the ratios themselves are not precise,[189] they do permit a rough ranking of various tribes: Luyia (97), Kikuyu (102), Meru (102), Nandi (122), Kamba (182), Giriama (202), Gusii (210), Kipsigis (272), Luo (281), Digo/Duruma (292). No explanation is immediately apparent for this ordering. In some instances it appears to follow the degree of modernization (e.g., the Kikuyu are second), but in others it is just the reverse (the Nandi substantially precede the cognate Kipsigis;[190] the highly westernized Luo are next to last[191]). Within a given tribe the order of its sub-divisions is equally perplexing. Kamba of Machakos District (174), which borders on Nairobi, are somewhat more litigious than those of the more isolated Kitui District (197), but the traditionalist Luo of South Nyanza (228), are well in advance of their more modern counterparts in Central Nyanza (338), and among the Kikuyu a similar reversal occurs between the allegedly traditional Murang'a District (93)

186. I have analyzed the entire body of tort litigation for 1966 for the following 16 courts: Kiambu (Kikuyu), Iveti (Kamba), Kilungu (Kamba), Gwirani (Digo), Kinango (Duruma), Kaloleni (Giriama), Kilifi (Giriama), Wundanyi (Taita), Kericho (Kipsigis), Sotik (Kipsigis), Lurambi (Luyia), Mumias (Luyia), Hamisi (Luyia), Maseno (Luo), Doho Kosele (Luo), Kisii (Gusii). In addition, I have data on litigation in Kiambu in 1948 which offers at least some historical perspective.

187. See Kenya, Ministry of Economic Planning and Development, Statistics Division, III Kenya Population Census, 1962, at 20 (1966) [hereinafter cited as Kenya Census, 1962].

188. The figures chosen represent the total number of civil cases except those involving title to land, or maintenance of an illegitimate child under the Affiliation Act. The former have been excluded because the process of land consolidation and registration, which withdraws such cases from the courts, has proceeded at differential rates among various groups. The latter are not customary law controversies. These figures are calculated from the 1966 Annual Returns of the African Courts, filed with the African Courts Officer in the Law Courts, Nairobi.

189. Loss of accuracy is due to a number of factors. Population statistics were calculated four years prior to 1966, the year for which litigation has been analyzed; areas may have grown at differential rates in the intervening period. The geographic areas for which population is calculated and those on which courts draw are not in every case identical, although they diverge only slightly. However, the fact that the ratios are all of the same order of magnitude is a rough confirmation of their validity.

190. This anomaly may be due to the presence of a large number of Kikuyu in Nandi District (there are about 280,000 throughout Rift Valley Province, as opposed to fewer than 138,000 Nandi within Nandi District) who engage in a great deal of litigation among themselves. See Kenya Census, 1962, at 35-36.

191. This inversion may be due to the persistent vitality of indigenous institutions for the settlement of disputes, at least where the litigants are fellow clansmen. See Table II and accompanying explanation.

and Kiambu (109), whose residents often work in Nairobi, only a few miles away. Perhaps the only unambiguous conclusion is that, throughout Kenya, the courts are accessible to and utilized by Africans with considerable frequency. Each case involves at least two parties, often up to a dozen witnesses, and a large audience of relatives, friends and loungers —perhaps a score or two of people. Given a ratio of one case for every one or two hundred people each year it appears likely that most Kenya Africans attend a civil dispute every few years.[191a]

(*b*) Attributes of the litigants, of claims, and of the judicial process may vary from tribe to tribe for a given wrong, and from wrong to wrong within a single tribe. Therefore each independent variable, e.g., literacy of litigant, periodicity of filing claims, or length of time between filing and final judgment, must be correlated separately with each dependent variable, tribe and tort. To illustrate the significance of the first category of indices, litigant character, consider how the proportion of parties of a given sex may fluctuate:

Table I: Sex of Litigants

Percentage of parties who are female, by tribe and by wrong:

Tribe	*Court*	*Wrong*	*Number of cases*	*Plaintiffs* %	*Defendants* %
Luyia	Kakamega	defamation	31	23	12
		assault	10	70	0
		damaging property	16	19	0
	Hamisi	defamation	22	22	8
		assault	6	43	0
		damaging property	12	25	15
	Mumias	defamation	32	9	5
		assault	16	31	4
		damaging property	20	15	7
Luo	Maseno	defamation	32	14	16
		assault	18	11	4
		damaging property	40	10	4
Gusii	Kisii	defamation	18	61	29
		assault	28	61	10
		(taking property)	30	20	8
Kikuyu	Kiambu	defamation	56	37	23
		assault	74	32	6
		damaging property	39	24	12

191*a*. The only other estimate I know of for Africa is that of Fallers for Busoga in Uganda. He states at one point that one in every ten, and at another place one in every 45, Busoga appear in court as a party each year. However, this figure includes appeals as well as original cases. *Op. cit. supra* note 182, at 22, 57.

Among the Luyia the most striking variation, repeated in all three courts, is that women are far more often plaintiffs, and far less often defendants, in assault cases than in either of the other kinds of aggressive wrong. It cannot be simply that women are more or less often involved in assaults than in other disputes, for this would not give rise to the great disparity between women as plaintiffs and as defendants. A more likely explanation assumes that women participate in each type of controversy with comparable frequency but choose different remedies according to the situation. It then appears that women are either unable or unwilling to defend themselves against physical attack, whereas they can return insult for insult or take adequate revenge for damage to property; and further that litigation is viewed as a more appropriate remedy for a woman who has been beaten than for one who has been abused or has lost her property. An inverse reasoning would tend to explain the prevalence of male defendants generally, and in particular the reluctance of men to seek redress for assault.

Turning for comparison to other tribes, very different patterns emerge. Neither the Luo nor the Kikuyu show any substantial variation in the number of women plaintiffs as among the several wrongs. In all three, women are rarely accused of assault but are frequently sued for abuse, confirming the general impression that words are one of the few avenues open to women to express aggression or resentment. But the most remarkable contrast is between the extreme litigiousness of Gusii women and the reluctance of Luo women to go to court. This accords with the divergent behaviour of the parties in the two cases already described in the first part of this article. The Luo "mothers" in the first case cried out that Augustino was a witch, but did not bring this accusation to court. Agnes, confronted with threats of witchcraft, immediately sought a judicial hearing to express fear and anger against her husband. Similar correlations could be made with the literacy, occupation, and religion of the parties to test the impact of education, wealth or status, and conversion on the choice of a judicial forum for dispute settlement in preference to self-help or informal arbitration.

Patterns of co-residence—the proximity of parties to one another—cast further light on the genesis of disputes and the means available to resolve them:

Data for both the Luyia and the Gusii illustrate one important pattern. Most wrongs—defamation, assault, cattle trespass, damage to crops or property—occur between members of the same village or sub-location, persons who live no more than a mile or two apart. This is hardly surprising, since controversies can only arise between people in contact and, at least outside the immediate family, greater contact tends to increase the chance of friction. In light of this generalization the three exceptions

Table II: Proximity of Parties

Percentage of parties who live within a given geographic unit, by tribe and by wrong:

				Parties live in same:		
Tribe	*Court*	*Wrong*	*Number of Cases*	*Village*	*Sub-Location*	*Location*
Luyia	Kakamega	defamation	31	68%	23%	10%
		cattle trespass	35	77	20	3
		cutting crops	8	50	25	25
		damaging property	8	62	25	12
		impregnating girl	9	22	33	44
		assault	8	88	0	12
		taking property	8	25	75	0
Luo	Maseno	defamation	38	5	82	13
		cattle trespass	20	15	85	0
		cutting crops	40	12	75	12
		assault	27	7	74	19
		taking property	5	0	40	60
Gusii	Kisii	defamation	18	83	17	0
		cattle trespass	47	77	21	2
		affiliation	14	14	21	64
		assault	30	43	40	17
		removing wife	8	0	12	88
		taking property	33	33	30	36

acquire significance. Sexual offences and instances of theft occur more often between different villages, and with considerable frequency between different sub-locations. Some tentative explanations should be investigated. Small-scale communities offer an individual little privacy with respect to his activities or his property. Where material possessions are few, and generally familiar to the whole neighbourhood, it would be impossible to hide stolen goods. *A fortiori*, a woman married within the locality could not be concealed, and her presence would create intolerable tensions. That unmarried girls tend to take strangers as lovers is probably a consequence of incest rules in societies which proscribe members of the localized descent group as potential sexual partners.[192] Luo litigation supports these hypotheses, but is distinguished by an astonishing paucity of disputes between fellow villagers. Perhaps this is an indication of the continuing vitality of indigenous arbitral institutions within the village. Such an explanation finds confirmation in the reticence of the otherwise highly westernized Luo to invoke the courts, compared with most groups in Kenya. Apparently, despite advances in education and the impact

192. See, e.g., LeVine, "Gusii Sex Offenses: A Study in Social Control." 61 Amer. Anthrop. 965, 974 (1959). Even if the man actually responsible is a close neighbour, the girl will probably accuse someone outside the neighbourhood, with whom sexual relations would not be incestuous. The stigma of incest not only is greater than that of illegitimate pregnancy, but the latter appears to fall more heavily on the man than on the girl. Both members of an incestuous couple may frequently be expelled from the community, but the remedy for simple pregnancy stresses the man's responsibility by requiring him to pay compensation to the girl's father.

of missionaries, traditional elders—the *joduong' gweng'*—still exercise considerable authority over localized controversies.[193]

(*c*) If we turn our attention from the identity of litigants to the characteristics of the claims they assert, an initial discrimination among tribes is possible in terms of the proportion of total litigation devoted to tortious disputes:[194]

Table III: Tortious Disputes

Percentage of total disputes which are tortious, by tribe and by court:

Tribe	*Court*	*Tortious Disputes*
Kipsigis	Kericho	55
Kikuyu	Kiambu	54
Luo	Maseno	51
Luyia	Mumias	42
Gusii	Kisii	41
Kamba	Iveti	36
Digo	Gwirani	31
Luyia	Hamisi	30
Luyia	Lurambi	26
Duruma	Kinango	24
Giriama	Kilifi	18
Luo	Kosele	18
Taita	Voi	12

I suggest that this sequence, like that shown in the utilization of the courts, roughly follows the degree of westernization.[195] Kikuyu, Luo, Luyia,

193. See Wilson, *Luo Customary Law and Marriage Laws Customs* 4 (1961). The allocation of primary courts in Kenya further illustrates this difference. In the Kikuyu districts of Kiambu, Murang'a and Nyeri there is, on average, one court for every 76,900 people; in the Luo districts of South and Central Nyanza there is only one for every 103,000. Each Luo court is thus capable of serving about 50 per cent more people.

194. It is very difficult to formulate an entirely satisfactory definition of a tortious dispute for the purposes of African customary law. I worked with the following concept: A wrong is any act or omission which injures another person physically, emotionally, materially, or in his personal relationships, where the injury does not consist of (1) failing to fulfil a pre-existing obligation or (2) failing to perform an agreement. The first exception was designed to exclude such claims as that by a sister's son against his mother's brother for a gift of cattle among the Luyia. See Wagner, II *The Bantu of North Kavirondo* 110 (1956). The second exception was intended to exclude debt and bride-wealth cases. I identified more than 50 distinct wrongs among the several tribes, but there is not room or occasion here to list them.

195. See notes 190-91 *supra* and accompanying text. Here, too, some of the apparent departures from the proposed hypothesis can be satisfactorily explained. Kakamega is the principle administrative centre of the Luyia, an urban community with good schools, which clearly possesses a highly westernized population. However, the judges of the Lurambi African Court, which serves this area, operated under the mistaken belief that any wrong which was even colourably a violation of the Penal Code had to be brought as a criminal prosecution rather than as a civil action. See, e.g., Lurambi A.C. C.C. 477/66 (Oct. 24, 1966) [action for abuse dismissed on the grounds that the words were likely to cause a breach of the peace, and hence could only form the basis for a criminal complaint under Penal Code s. 182(*d*)]. On the other hand, the Kericho African Court, used by the less advanced Kipsigis, encouraged litigants to seek compensation for assult—the most common source of controversy—through civil actions.

Gusii and Kamba generally bring more tort actions than do the more conservative coastal peoples, and the Luo of Maseno, for many years the site of an important mission station more than those of Kosele. Since there is no reason to assume that European contact alters the relative incidence of torts, it may be that such contact increases the willingness of wronged persons to seek redress for those torts in court. The readiness of people to use a foreign institution like the primary courts depends in part on the degree to which it is consistent with, and supportive of, other aspects of their culture. The collection of a debt by means of the imported judicial system does not essentially change the nature of the obligation and consequently the first claims to be raised, and those which continue to preoccupy courts among the less developed peoples, are debts—the return of cattle loaned or money borrowed, the payment of outstanding wages or sales price, the transfer of brideprice owing or to be returned. By contrast, an injured individual who complains to the court that he has been wronged must expect customary substantive rules and procedures to be significantly altered by alien attitudes and techniques. This can be seen most clearly in witchcraft disputes, but even in assault or defamation cases, or where a girl has been impregnated, the remedy provided transforms the traditional right. Therefore only those groups prepared to accept such modifications are likely to entrust their tortious disputes to the courts.

Finer distinctions between groups are made possible by examining variations in the content of tortious litigation:

Table IV: Incidence of Wrongs:

Relative incidence of wrongs, expressed as a percentage of total tortious disputes, by tribe and by court:

Tribe	*Court*	*Number of wrongs*	*Defamation*	*Assault*	*Cattle trespass*	*Taking or impregnating unmarried girl*	*Taking wife or adultery*	*Damaging property*	*Damaging crops*	*Taking or failing to return property*	*Rape*	*Loss of virginity*
Luyia	Hamisi	119	17	5	21	23	4	4	3	6	1	1
	Mumias	152	21	11	29	6	6	5	11	5	1	1
	Kakamega	157	20	6	22	21	8	7	4	6	–	–
Luo	Kosele	62	26	6	26	3	—	2	6	24	–	6
	Maseno	143	22	13	12	3	11	2	26	5	–	2
Gusii	Kisii	216	8	13	22	17	8	6	7	15	1	–
Kikuyu	Kiambu	318	18	23	3	41	—	6	7	3	–	–
Kipsigis	Kericho	152	17	58	1	6	—	6	1	7	–	–
	Sotik	62	—	55	30	2	—	3	—	6	–	–
Giriama	Kilifi	53	2	15	2	2	70	—	6	4	–	–
Digo	Gwirani	38	13	13	5	5	55	—	8	—	–	–
Duruma	Kinango	53	6	5	3	19	54	—	—	9	–	–
Kamba	Iveti	143	15	9	10	12	8	5	29	6	1	–

Isolated differences are immediately apparent in the unusual frequency of a particular wrong within certain tribes: impregnating an unmarried girl among the Kikuyu, adultery along the coast, assault for the Kipsigis. Moreover, if wrongs are grouped into broader categories even more striking divergencies emerge. Invasions of exclusive sexual rights represent between 60 and 73 per cent of all wrongs among the Digo, Duruma and Giriama. Away from the coast only Kikuyu frequently seek to redress such rights in court, and they are concerned entirely with pre-marital pregnancy which figures significantly only among the Duruma. Invasions of property rights—cattle trespass, damaging property or crops, and taking property—constitute half of all wrongs among the Kamba. In no other court is the proportion comparable except Maseno, where land consolidation has generated numerous controversies over title, often conducted by damaging crops on the disputed land, thus temporarily inflating the number of such cases. Violations of the right to integrity of person by assault or abuse constitute three-quarters of all wrongs among the Kipsigis, a proportion which no other group approaches. If to these torts are added damage to or theft of property or crops, as constituents of a class of aggressive wrongs, the percentage almost reaches 90, again far exceeding the next nearest tribe, the Kamba. Caution is definitely advisable in interpreting these statistics, but they do at least suggest that tribes may differ not only in their willingness to submit different kinds of disputes to the judicial process, but also in the relative importance of sex, property and aggression as a source of these disputes.

Claims for the redress of wrongs can be analyzed in other ways which I can here only mention. The time of filing suit may illustrate a variety of periodicities. First, a given wrong may occur more frequently at a specific season: cattle trespass is most destructive when crops are ripening; assault increases just after harvest when people are idle and beer is plentiful. Second, the delay between tortious act and filing may depend on the availability of informal means of arbitration as well as on the intensity of plaintiff's desire to redress the injury. Finally, the requirement that court costs be prepaid may render litigation subject to the economic cycle of agricultural communities, or to competing financial demands represented by personal taxes or school fees.

The amount sought as compensation for a given wrong may also vary from tribe to tribe. Certain claims, for instance those in adultery or pregnancy cases, still represent traditional remedies, the monetary award corresponding to a customary number of livestock. Others seek restitution for property damage which can be precisely calculated in monetary terms, for example cattle trespass; here tribal differences may possibly be correlated with the degree of economic development. But the

quantum of damages demanded for verbal and physical assault is largely arbitrary; customary standards are accorded little respect today,[196] and it is difficult to assign an objective value to the injury. In view of this, it is surprising that there is so little variation in the average claim asserted:

Table V: Assault and Abuse

Characteristics of claims and awards in assault and abuse cases, by tribe and by court:

		(1)	(2)	(3)	(4)			(1)	(2)	(3)	(4)		
		ASSAULT CASES						*ABUSE CASES*					
Tribe	*Court*	*Number of claims*	*Average claim*	*Number of awards*	*Average award*	*Ratio 3/1**	*Ratio 4/2***	*Number of claims*	*Average claim*	*Number of awards*	*Average award*	*Ratio 3/1**	*Ratio 4/2***
Gusii	Kisii	28	506/-	22	238/-	.79	.47	16	282/-	3	150/-	.19	.53
Luyia	Hamisi	6	376	2	483	.33	1.29	22	171	8	75	.36	.44
	Mumias	15	334	10	194	.67	.58	31	268	13	262	.42	.98
	Kakamega	9	211	6	82	.67	.39	31	266	13	227	.42	.85
Luo	Kosele	4	150	2	25	.50	.17	16	218	5	146	.31	.67
	Maseno	16	262	8	163	.50	.63	30	248	12	178	.40	.72
Kipsigis	Kericho	85	254	52	158	.61	.63	26	205	10	103	.38	.50
	Sotik	34	233	30	173	.88	.74						
Taita	Wundanyi	6	175	6	118	1.00	.67	25	100	11	100	.44	1.00
Giriama	Kaloleni	8	213	7	140	.83	.66	15	160	10	61	.67	.38
Kamba	Iveti	9	293	6	140	.67	.48	30	194	13	185	.43	.95
Kikuyu	Kiambu ('66)	74	212	47	164	.64	.77	56	105	32	91	.57	.87
	Kiambu ('48)	11	381	10	218	.91	.57						

*Percentage of claims made which are successful: ratio of number of awards to number of claims

**Average award expressed as percentage of average claim.

Departures from this general uniformity therefore acquire added significance, especially the claims made by Gusii victims of assault and abuse, which are as much as twice those of most other peoples. Here is further evidence that physical, and to a lesser degree verbal, expression of hostility is strongly condemned by Gusii, who react by seeking legal redress. Such statistical data as the average claim and the distribution of claims within the range of variation can help to place individual cases in better perspective.

The response of defendants in the course of litigation can exhibit patterns just as significant as the demands of plaintiffs, and must be subjected to a similar analysis. Within the Kiambu District African

196. See, e.g., Khwisero A.C. C.C. 146/66 (July 26, 1966), appeal dismissed, Kakamega Mag. C.A. 132/66 (N. K. Nyang'era, Sept. 20, 1966). Plaintiff sued defendant and defendant's daughter for Shs. 1,000/- damages because the second defendant had blinded the eye of plaintiff's daughter by accident. The parties agreed that the Luyia customary compensation for such an injury was a cow and a sheep. Nevertheless, the lower court awarded Shs. 600/-, reducing the claim only because the injury was accidental. The Magistrate referred the injury to the Provincial Surgeon who assessed it as a 40 per cent disability under the Workman's Compensation Act. The court rejected this as irrelevant, but nevertheless affirmed the award below as fair.

Court, for instance, nearly everyone (93%) who was sued for assault contested the claim, but more than a third (38%) of those accused of impregnating an unmarried girl conceded, either expressly or by failing to appear. The former statistic is not surprising: an assault case which reaches the courts is likely to be the expression of some underlying conflict which cannot easily be resolved amicably. The latter figure is a survival of the historical willingness of Kikuyu men to accept an allegation of paternity and marry the girl who made it. What requires explanation here is rather why 62 per cent of the defendants now resist liability. One hypothesis is that unmarried mothers are advancing a greater number of unfounded claims, either out of uncertainty as to the identity of the true father[197]—a result of modern promiscuity—or with the intent of naming an innocent man who is more likely to pay the substantial customary compensation (Shs. 700/-) and maintenance under the Affiliation Act, or marry the girl.[198] This development is confirmed by the increase in unsuccessful suits, from only three per cent in 1948 to 13 per cent in 1966.

The proportion of contested cases varies even more between courts than between torts within a court. Only 16 per cent of a sample of 140 cases initiated in the Kapsabet African Court of Nandi District in 1966 were contested; the rest were withdrawn, conceded, or decided in the absence of one party. A court which concludes 84 per cent of its judicial business without a hearing is clearly performing a very different function from one in which most disputes are hotly contested. What occurs in court is then not the most important element of the process of dispute settlement. Rather resort to court appears to be a threat designed to persuade an opponent to compromise, and a decree once obtained is merely another element in the extra-judicial bargaining process. This, at least, is one hypothesis to be explored, and one which would not have been discovered by concentration on individual contested cases.

(*d*) With knowledge of the social environment of the legal process—who goes to court and what they do there—court statistics may now be analyzed with the more traditional aim of describing judicial behaviour. Within a given tribe specific claims have varying probabilities of success.

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197. See, e.g., Kiambu Mag. C.A. 168/66 (Mar. 8, 1967), dismissing appeal from Githunguri A.C. C.C. 647/66 (Sept. 24, 1966) (Action dismissed; "Could be she was conceived by defendant who had taken her as a wife for a couple of days or perhaps by another friend of hers. She seems really confused."); Kiambu Mag. C.A. 61/64 (Dec. 17, 1964), dismissing appeal from Githunguri A.C. C.C. ?/64 (Oct. 13, 1964) (Action dismissed; "She is uncertain who caused her pregnant.")

198. See, e.g. Kiambu Mag. C.A. 46/63 (G. N. Cooke, Sept. 7, 1963), allowing appeal from Kiambu ACA CA 46/63 (May 21, 1963), dismissing appeal from Kikuyu AC CC 175/63 (Apr. 25, 1963) ("In cases of this nature, the girls are attracted by the wealth and advantages they would get from the putative father.")

In Kiambu, for instance, these range from almost 90 per cent in paternity suits to only a third for complaints concerning damage to growing crops.

Table VI: Success in Kiambu Cases

Percentage of actions filed which are successful in Kiambu District African Court, by wrong:

Wrong	*Percentage Successful*
Pregnancy	87
Theft	67
Assault	64
Adultery	60
Insult	57
Cattle trespass	56
Property damage	56
Cattle trespass	33
Property damage	
Crop damage	

Frequency of success low the difficulty of proof. A pregnant girl will generally know and be willing to identify the father of her child, and courts have in the past given great weight to such testimony,[199] although they are becoming more suspicious.[200] By contrast, the comparable offence of adultery is more difficult to detect and prove absent a wife's co-operation.[201] Offences at the lower end of the scale evince the same pattern. People involved in boundary controversies often seek revenge by destroying crops on the disputed land; they are usually able to conceal their responsibility by working at night on farms far from any habitation.[202] When cattle destroy crops, they do so during the day while they are grazing, and leave tell-tale hoof marks which can be traced; at the same time, this cause of action is subject to stringent rules of proof—

199. See, e.g., Kikuyu A.C. C.C. 413/65 (n.d.), appeal dismissed, Kiambu Mag. C.A. 145/65 (n.d.) (girl not likely to mention the name of a man with whom she has not had intercourse); Nyeri D.O. C.A. 4/64 (Apr. 4, 1964), dismissing appeal from Nyeri A.C. C.C. 23/63 (n.d.) ("I do not believe that the girl could merely mention him if he has no sexual intercourse with her.")

200. See, e.g., Nyeri Mag. C.A. 26/64 (D. Gathira, June 15, 1965), allowing appeal from Nyeri A.C. C.C. 34/64 (July 27, 1964). The lower court had reasoned that "the girl could not have manufactured the story if they had not had sexual intercourse. . . . she could not stand the discussion in her father's presence if they had not had sexual intercourse." The Magistrate commented, in reversing: "The way the lower court reasoned its judgment is bad if not ridiculous. . . . I consider that it was unsafe for the lower court to assume that Leah was all through true. It is a common weakness in the Kikuyu minds to think in the old way, that all that a girl tells a man in sexual matters was true and to presume that the man was guilty. Time for that kind of thinking is gone. We are in a new era. I believe that it is necessary that such evidence of such a witness as Leah should be supported by other evidence before being wholly accepted."

201. Among the coastal tribes, where wives are more willing to testify against their lovers (or are subject to greater coercion), the proportion of successful adultery cases is much higher.

202. If circumstances render evidence more readily available as where the crops were uprooted (1) during the day, or (2) near plaintiff's home, the court may hold plaintiff to a higher standard, and find against him if he fails to produce eye-witness testimony. See (1) Kiambu D.A.C. C.C. 14/66 (Jan. 25, 1966); (2) Kiambu D.A.C. C.C. 82*B*/66 (May 25, 1966) (tree cut down 40 feet from plaintiff's house).

the cattle must be discovered in the damaged field, shown to an eye-witness, and taken immediately to the owner.[203] Even easier of proof are cases of insult and assault, which by their nature require the presence of both parties and often attract other witnesses.

Nevertheless, divergencies between these last two wrongs do exist, and may be further illuminated by statistics showing their disposition by 12 different courts. (*See* Table V.) Assault cases are everywhere the more successful of the two. Several factors may contribute to this. First, real evidence—physical injury and perhaps also a weapon—is only available for assaults; as suggested earlier real evidence appears to have exaggerated probative value. Second, since abuse cases depend entirely on testimonial evidence, they are more easily fabricated, and courts are therefore more suspicious of such allegations. The apparent impact of modernization on the success of assault cases tends to support these hypotheses. Complaints of assault were proved less often in Kiambu in 1966 than in 1948, and less often in Kiambu or Iveti (both urban centres of advanced tribes) than in Kaloleni, Sotik, or Wundanyi (smaller villages in less developed regions). This is at first glance anomalous, for one would expect plaintiffs with a better education to present their claims more persuasively. If, therefore, they tend to fail more frequently, the explanation may lie with the factors suggested above. Real evidence loses its cogency as judges become more sophisticated,[204] and the educated inhabitants of urban areas have so developed the ability to advance an effective case that they can, and do, put forward an increasing number of fraudulent suits.[205]

Another significant difference between assault and insult claims is the degree to which they are inflated. One way of measuring this is to compare the average award with the average claim. Surprisingly, this

203. See, e.g., Kiambu D.A.C. C.C. 11/66 (Jan. 20, 1966): "From the evidence given there is no witness who saw defendant's cattle in plaintiff's shamba. The cattle were not handed to an elder to take them to the defendant. Plaintiff's witness saw only tracks of cattle which he believed were made by the defendant's cattle. Kikuyu custom was not followed properly in this case and therefore we uphold the defence that the damages were [not] made by plaintiff's cattle."

204. See, e.g., Kiambu D.A.C. C.C. 185/66 (June 22, 1966) (Court examined plaintiff about his failure to produce teeth allegedly knocked out, but then accepted medical report showing they had been lost); Kiambu D.A.C. C.C. 148/66 (Apr. 21, 1966) (defendant argued: "plaintiff should have shown the tooth to the elders" who were arbitrating the matter; nevertheless, the court again accepted the medical report as sufficient evidence of the loss).

205. For a case with a fabricated defence, cf. Kiambu D.A.C. C.C. 100/66 (Mar. 24, 1966). Plaintiff there sued her husband for assaulting her at Karuri village. His defence was that he was in Nairobi that day. The court found for plaintiff, saying: "We wish to record that from Nairobi to Karuri where the assault took place is between ten and 11 miles and there is a flow of buses to and from Nairobi almost every minute . . . To say that Patrick was at Nairobi . . . is immaterial as the buses are available at any time during the day. The story given by the defence and his witnesses is a cooked one and we entirely disagreed with it."

method of comparison indicates that assault claims are more inflated than complaints of abuse.[206] My own expectations would have been quite the reverse. I would have thought it more likely that claims for abuse would be greatly exaggerated, since to determine a cash equivalent is more difficult for an injury inflicted by words than for a physical injury. Moreover, contemporary claims for abuse bear no relation to traditional remedies, except among the Taita,[207] whereas the customary scale of damages for physical injury is still to some extent followed today.[208] Perhaps abuse claims are in fact more inflated, and yet the awards are more closely proportioned to these claims for the two reasons just mentioned: since there is neither a customary nor a physical standard by which to assess abuse claims, the courts are compelled to accept or reject them *in toto*.

The record of the Kisii court conforms to this general picture while at the same time displaying the unique characteristics of Gusii litigation. Assault cases succeed four times as often as do claims for abuse; the former are more frequently and the latter less frequently successful than comparable cases elsewhere. In both kinds of cases the claims are inflated, but claims for assault are reduced more drastically by Gusii courts than by most other courts, whereas the treatment of abuse claims is not exceptional. From these facts there emerges a picture of Gusii litigants rushing to court with exaggerated claims as soon as they suffer the slightest verbal or physical offence. Gusii judges share the society's condemnation of physical aggression, in that they allow an unusually large number of such claims, but not to the extent of acquiescing in the exaggerated value which Gusii plaintiffs place on their physical integrity. On the other hand, while Gusii culture also deplores the verbal expression of hostility, Gusii judges are less influenced by this attitude. Either they have been westernized to the extent of believing that "sticks and stones may break my bones but names will never harm me," or else they feel that the abused man who seeks public satisfaction for his grievance has just as much

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206. Two of the exceptional courts, Hamisi and Kaloleni, had too few cases to be statistically significant. Kericho, however, requires an explanation. It may be that the Kipsigis emphasis on physical violence, as shown in the unusually large number of assault cases, leads them to minimize the seriousness of injuries, with the result that it is not considered manly to complain too loudly about how badly one has been hurt.

207. See, e.g., Taita D.A.C. C.C. 212/66 (Sept. 13, 1966) (claim of a bull worth Shs. 100/-).

208. See, e.g., Kiambu D.A.C. C.C. 88/66 (Mar. 17, 1966) (claim for a *thenge* or ram, and a *kibembe* or tin of honey, for assault); Kiambu D.A.C. C.C. 90/66 (Mar. 15, 1966) (same); Machakos Mag. C.A. 54/64 (R. Mullaa, Sept. 25, 1964), allowing in part appeal from Nziu A.C. C.C. ?/64 (n.d.) (customary compensation for minor assaults is a goat; for major assaults it is a bull and a goat).

violated the rule against aggressive acts as has the man who first uttered the abuse.[209]

Because standards of proof are quite rigorous in the primary courts, the success of a claim is a reasonably good indication that it represents a real injury. Granting such an assumption, it is possible to use information from case files and registers to determine the efficiency of these courts in enforcing legal rights. This efficiency can be measured in two ways. First, an index of the economic cost of litigation can be developed by expressing the total court costs paid by the parties as a percentage of the ultimate award. The figures thus obtained could be compared by wrong and by tribe, as well as with the economic cost of redressing the same rights in other fora, for instance by informal arbitration.[210] Second, the time consumed by each stage of the judicial process offers another index of the efficiency of the courts in resolving disputes. Comparisons of the sort suggested above could be made with respect to the length of time elapsed between tortious act and filing, between filing and judgment, and between judgment and its partial or total satisfaction. Clearly information of this kind is absolutely essential to discriminate between what Llewellyn contemptuously called "paper rules" and those practices which he sought to focus on as law-in-action.[210a] The significance of any remedy, no matter how often it is apparently granted by the judge of a primary court, is limited by its economic cost to litigants, and by the length of time required actually to secure it.

The interpretations offered above only skim the surface of the wealth of insights into the real workings of the judicial process which statistical analysis permits. Many other, more sophisticated correlations are possible between the numerous variables for which there is data. The sex of a

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209. Indeed, litigation is seen by the Gusii as just such an aggressive act. See R. LeVine, "Witchcraft and Sorcery in a Gusii Community," in *Witchcraft and Sorcery in East Africa* 221, 250. (Middleton and Winters ed. 1963).

210. In comparing judicial with extra-judicial procedures, it is necessary to look not only at the costs of the two, but at the possible compensation to be gained. It is not surprising that the court, which has coercive powers, will award higher judgments for such wrongs as abuse and assault than are likely to be obtained by informal compromise. What is interesting is that "customary" claims may vary in and out of court. The Kikuyu Law Panel has fixed compensation for impregnating an unmarried girl at 20 goats (worth Shs. 20/- each) and six rams (worth Shs. 50/- each). Meeting at Fort Hall, May 1-2, 1962. However, when agreement is reached out of court the compensation paid is only half the above, ten goats, a bull equivalent to three rams, and beer. In an extremely interesting case decided recently it was held that, where such compensation has been paid out of court pursuant to an agreement, plaintiff may nevertheless sue for the balance of the official compensation if defendant failed to obtain a written release of liability upon completing the unofficial payment. See Mukurweini District Magistrate's Court C.C. 42/68 (Mar. 26, 1968).

210*a*. See Llewellyn, "A Realistic Jurisprudence—The Next Step," 30 Colum. L. Rev. 431, *passim* (1930).

party may, for instance, bear a significant relationship to the success of his claim; the degree to which a claim is inflated may affect the speed with which it is enforced. Analyses of this sort remedy any lack of representativeness from which the study of individual cases may suffer. They are only now possible as the primary courts have begun to keep detailed accurate records.

V. Appellate Courts

The materials examined so far have been drawn entirely from the primary courts, an approach which may appear unusual to legal scholars accustomed to analyze appellate decisions. This portion of the article, therefore, will consider the extent to which African circumstances justify, and perhaps require modification of the techniques of conventional scholarship. Reliance on appellate judgments appears to derive from three interrelated assumptions. Central among these is the belief that lawyers should focus their attention on the interpretation and development of legal rules. Procedures for the preliminary determination of the facts to which these rules are applied are of secondary interest, relegated largely to the restricted field of evidence. In the American judicial system, indeed, issues of fact are generally entrusted to the jury, about whose functioning astonishingly little is known. Second, granting this concern, appellate judgments contain a better discussion of substantive rules, for two reasons. Since they are uncomplicated by factual controversies, issues of law are presented more sharply and in greater detail. Moreover, the level of judicial analysis is higher because there is an assumed correlation between talent and rank in the appellate structure. Finally, reliance on the judgments of the highest court is both permitted and required by the hierarchical nature of our judicial system: permitted because decisions of an appellate court are binding on the subsequent actions of an inferior tribunal; required because deviant behaviour in a primary court does not accurately reflect the "real" law enshrined in appellate decisions.

The following diagram summarizes the description of the Kenya appeals system contained in the first part of this article and will help in assessing the relevance of these principles to Kenya:

Judicial Structure of Kenya 1930—Present

1.	CIVIL CASES:	High Court (1967—Present) Court of Review (1951–67) Supreme Court (1930–51)
	CRIMINAL CASES:	High Court (1964–67) Supreme Court (1930–64)

2. Provincial African Courts Officer (1951–67)
   Provincial Commissioner (1930–51)
3. Resident, or First or Second Class District Magistrate (1967—Present)
   Appeal Magistrate (1962–67)
   District Officer (1932–62)
   District Commissioner (1930–32)
4. African Court of Appeal (1951–64)
   Native Appeals Tribunal (1930–51)
5. Third Class District Magistrate (1967—Present)
   African Court (1951–67)
   Native Tribunal (1930–51)

Can the central assumption of conventional legal scholarship-concern with the analysis of legal rules—be retained in this judicial environment? I think not. Of the several thousand cases which I read, very few of those decided by African Courts or Appeal Magistrates involved controversies about the identity or desirability of rules. Though parties might emphasize different rules they rarely challenged those advanced by an opponent, or urged judicial modification of an existing rule. Nor did courts engage in the development of substantive law on their own initiative. Rather, as the two case analyses presented in the first part of this article should indicate, attention was directed toward the determination of disputed facts. It was within this process of fact-finding that substantive rules played their role, being invoked by a litigant to strengthen his own evidence and discredit that of an opponent (as in the Gusii case), and being utilized by the judge to choose between inconsistent stories (as in the Luo case). The Kenya decisions thus seem to provide striking confirmation of Jerome Frank's contention that "fact-uncertainty" is the principal source of legal uncertainty.[211] If this view of the judicial process is correct, then surely legal scholarship should be concerned primarily to discover the critical rules governing the determination of facts and not allow itself to be limited by conventional preoccupations with the study of substantive principles which are relatively clear and static because they are isolated from the stress of controversy which might force them to develop.

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211. Frank, *Law and the Modern Mind* xiv (6th ed. 1949). Although Frank, of course, made his assertion about the American legal system, his observations may be even more illuminating in the African context. Factual disputes are pervasive in the primary courts of Kenya because standards of veracity are extremely low. Litigants offer self-serving testimony and witnesses are expected to support the party who called them. In the course of a year of leafing through tens of thousands of cases, I came across only one prosecution for perjury (actually a citation for contempt by an irate judge). Issues of law receive relatively less attention, perhaps because there is no professional bar with a vested interest in raising them.

Conventional scholarship was best served by the examination of appellate decisions. To the extent that appellate courts in Kenya share with their English or American counterparts a devotion to the explication of rules, the radical change in focus just suggested may demand a re-evaluation of the utility of such decisions. In actuality, however, appeals in Kenya were conducted differently. Until recently reports of primary court proceedings were not adequate to allow an appellate court to restrict its review to the record alone. Hearings by African Courts of Appeal were always *de novo*, and District Officers and Appeal Magistrates often heard a great deal of additional testimony.[212] However, subsequent appeals to the Provincial Commissioner, Provincial African Courts Officer, and Court of Review, were based entirely on the record and suffered from that limitation. But though it seems that the higher the judge the less opportunity he had to consider vital factual issues, may this disadvantage not be outweighed by his superior judicial ability? The answer is unclear. A judge's rank in the judicial hierarchy may well be correlated with his legal skills, but unfortunately such rank also appears to have varied inversely with knowledge of, and tolerance for, customary law and its social background. There was little difference in terms of these criteria between primary court judges and those who sat on the African Courts of Appeal, except perhaps in length of experience, since personnel circulated between the two. The rest of the appellate structure may be divided into two categories. The first, and by far the largest, was the expatriate bench. Prior to independence this included the District Officers, Provincial Commissioners, Provincial African Courts Officers,[213] Court of Review,[214] and High Court. Today, Asians and Europeans still occupy most of the higher levels—as Resident Magistrates[215] and judges of the High Court.[216] With significant exceptions the upper echelons of this group, though legally sophisticated, possessed little or no understanding of customary law. The attitude of the lower strata varied greatly, depending on term of duty and personal inclination, but few had any legal training.

212. That this was the practice despite explicit instructions to the contrary is some index of the inadequacy of many primary court judgments. See Waller, *African Courts Handbook: Guide to Hearing of Civil Appeals by District Officers* 1-2 (1961): "hear only such *additional* evidence as may be necessary to elucidate any 'issue' or may be necessary in the light of the appellant's statement. It may often happen that no additional evidence is necessary at all; do not start to record all evidence '*de novo*'. You are hearing an appeal, not a case of the first instance; . . ."

213. There are exceptions, for instance S. R. Karunditu, who was for some time acting Provincial African Courts Officer for Central Province.

214. One African, Shadrack Malo, a Luo, did sit on the Court.

215. There are two African Resident Magistrates: Mr. J. O. Nyarangi, a Gusii, and Mr. E. N. Aroka, a Luo. In addition, two Deputy Registrars of the High Court also function as Resident Magistrates: Mr. Mukele, a Luyia and Mr. Onyango Otieno, a Luo.

216. The first African, Mr. Mwendwa, was appointed to the High Court as Chief Justice in 1968.

The African bench is almost entirely confined to the primary courts and, since the early 1960's, the first level of appeal—formerly the Appeal Magistrates and now the First Class Magistrates. Although the latter are a heterogeneous group they share certain advantages. All possess, as part of their culture, a sensitivity to customary legal thought and a familiarity with local behavioural patterns. As members of the educated elite, they have benefited from a superior secondary education and often have received some legal training as well.* Nevertheless, the value of cultural affinity is largely lost when these magistrates are posted outside their own community, as is often the case.[217] Though customary legal systems may be uniform in general principles, detailed rules vary widely; magistrates must then apply these alien rules to an unfamiliar sociocultural environment. Moreover, they must often work through interpreters. And education is also of ambiguous value; the greater eloquence obtained may only be used to express a condescending rejection of customary law which exceeds, in cultural bias, the opinions of expatriate judges. Yet despite these drawbacks, I found that on balance many Magistrate's Appeals were both superior in evidentiary record and legal analysis to the decisions of the primary courts, and at the same time more valuable than the judgments produced by subsequent reviews.

Even if appellate decisions possess no advantages for the scholar, their use may be mandated by a hierarchical system which endows them with a more authoritative voice in the statement of legal principles. But again the Kenya judicial system, though formally hierarchical, does not function this way. Superior courts can exert authority over inferior tribunals in two ways: by reversing erroneous judgments in the relatively small number of cases actually appealed, and by requiring that the vast number of cases which do not reach them be governed by appellate precedent. Appellate courts in Kenya do indeed reverse, and enforce their reversals, but too small a proportion of the body of litigation is appealed for this first method to have any substantial impact on the legal process. Of the approximately 250,000 cases decided by primary courts in 1966, no more than two or three thousand, or about one per cent, were appealed to a magistrate, and only one per cent of this latter group reached the Court of Review. Nor is this lack of direct impact adequately supplemented by the influence of example. Appellate decisions fail to compel that degree of obedience from the lower courts which they secure in England or America for two reasons. First, they are simply not known. None of the opinions of the Appeal Magistrates are published and only a small selection

**Editor's Note:* See "District Magistrate Training in Kenya", 5 *E.A.L.J.* 299 (December, 1969).

217. Of the 17 Appeals Magistrates about whom I have information, only nine were posted exclusively within their own communities.

of those of the Court of Review. Only the lower court whose decision is being altered is notified, and even it receives a mere statement that the appeal has been allowed, unenlightened by reasoning. Communication from the top of the hierarchy is largely restricted to occasional circulars from, and personal contact with, the African Courts Officer.

An extreme example may help to dramatize the importance of this point. In 1961 Nehemiah removed a girl from the school where she was studying and took her to live with him.[218] Josphat the girl's father, sued under Luyia "customary law" since both parties were of that tribe, and claimed repayment of the school fees he had expended for his daughter's education, a total of Shs. 1,175/-. The Lurambi African Court awarded Josphat Shs. 800/- for school fees,[219] and though this was reversed by the African Court of Appeal,[220] it was reinstated by the District Officer.[221] However, the Court of Review reduced the judgment to a heifer, worth Shs. 250/-, which it found was all that customary law allowed. It relied on a memorandum by the African Courts Officer which stated:

> "As the girl lived with Charles for some time, the father can claim one heifer as Luhya customary compensation for deflowering the girl which is presumed in a case of elopement. The claim for return of school fees even though interpreted by the District Officer as general compensation is untenable in this customary claim for compensation."

In another case, less than two years later, Abisai Hungulu sued Liveha s/o Amoyi and his father, Amoyi s/o Kidiya, because Liveha had impregnated Abisai's daughter Matride while they were in school together.[222]

218. Lurambi A.C. C.C. 227/61 (Apr. 19, 1961), appeal allowed, Kakamega A.C.A. C.A. 83/61 (June 3, 1961), appeal allowed, Kakamega D.O. C.A. 83/61 (Nov. 27, 1962), appl. to C.O.R. allowed, Kakamega District Registry Appl. 12/62 (May 15, 1964), appeal allowed, C.O.R. Appl. 1/64 (Ainley, C.J., n.d.). The names used for the parties are pseudonyms.

219. It gave no explanation for this figure. The girl had completed Standard VI at Intermediate School. Josphat agreed to accept brideprice but defendant refused to pay it. The court reasoned that defendant had taken the girl from school and now refused to pay brideprice for no reason. Defendant had previously been prosecuted for the customary crime of removing an unmarried girl and had been fined Shs. 100/-. Lurambi A.C. Cr.C. 578/60 (n.d.). At that time he had agreed to pay six head of cattle brideprice but had since failed to do so.

220. The Court of Appeal found for defendant because he had agreed to pay seven head of cattle brideprice and subsequently produced five head, which plaintiff had refused on the ground that they were too young. This excuse was unsatisfactory because plaintiff could have asked the elders to require defendant to produce better animals.

221. The District Officer stated: "I consider that plaintiff has a justifiable claim to compensation for a clear departure from native custom . . . Compensation in fairly assessed at school fees paid out to prepare the daughter for marriage to a good class husband. This girl cannot expect to get any but an inferior husband."

222. Hamisi A.C. C.C. 8/66 (Jan. 18, 1966), appeal allowed in part, Kakamega Mag. C.A. 89/66 (Aug. 26, 1966), re-hearing ordered by A.C.O. (letter of Dec. 3, 1966), appeal allowed in part, Kakamega Mag. C.A. 89/66 (Dec. 22, 1966). The names used for the parties are pseudonyms.

He claimed compensation for the Shs. 990/25 in school fees which he had spent for his daughter. The Hamisi African Court, located only a few miles from the Lurambi African Court, appeared to be ignorant of the Court of Review's decision, and granted Abisai Shs. 661/- for the fees he had been able to prove. Only Amoyi appealed and the Appeals Magistrate, who had by then succeeded the District Officer, allowed this appeal on the limited ground that a father cannot be held liable for pregnancy caused by an adult son. The African Courts Officer happened to see this decision and wrote an irate letter:[223]

> "What exactly does your judgment mean? Have you set aside the decision of the Hamisi African Court against both father and son, or only against the father? May I remind you and all Western Province African Courts that the Court of Review has already decided that there can be no claim for refund of ALL a girl's education costs because she becomes pregnant. She does not lose her education because she has a child. A parent can of course recover school fees paid in advance for the period the girl does not attend school as a result of her pregnancy."

The Magistrate justified his failure to allow an appeal by Leveha on the grounds that Leveha had not taken an appeal, and replied plaintively:[224]

> "Abisai and Amoyi are satisfied with my judgment, and Leveha with the judgment of the Hamisi African Court, since they have not complained. They are satisfied with it though it may be against the ruling of the Court of Review that there can be no claim for refund of all a girl's education costs. I was not informed of this ruling except when you wrote to me on 26.10.66 [the above letter]. If it is against the ruling of the Court of Review of which I was not aware then I can see no justification when you say that you are NOT satisfied with the manner in which this appeal was tried. Please you as my Senior Officer and as the African Courts Officer if my work does not satisfy you, say so and I am ready to accept any other duties that you may assign me".[225]

More important than the impassioned tone of this exchange is the fact that once again its contents were not communicated to those primary courts in Western Province which were supposed to be bound by this ruling. Both before and after the letter from the African Courts Officer,

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223. Letter of African Courts Officer to Kakamega Appeal Magistrate, Oct. 26, 1966.

224. Letter of Kakamega Appeal Magistrate to African Courts Officer, Nov. 10, 1966.

225. On re-hearing the Magistrate found that Adagala had paid Shs. 300/- for his daughter's last year of schooling, and that she had been expelled after completing half of it because of pregnancy. He therefore allowed Shs. 150/- damages. He did not allow compensation for pregnancy of two head of cattle because the boy and girl were related, and under such circumstances no compensation is paid.

in the Lurambi court whose judgment had originally stimulated the decision by the Court of Review, in the Hamisi court whose judgment was here reversed, and elsewhere in Kakamega District, plaintiffs sought and recovered compensation for *all* the school fees they had paid for daughters who had been removed from school and impregnated by defendants.[226]

Yet ignorance is not the only reason for nonconformity with appellate decisions; even were copies of opinions available to the primary courts it is doubtful whether they would have commanded much respect. The elders of the African Courts felt with some justice that they knew better how to resolve disputes according to customary law than did the appellate judges—certainly they were more skilled than the European and Asian bench, and probably more adept than African magistrates, who were strangers to the local community and might even be from another tribe.[227] Moreover, were adherence to precedent not voluntary, it would be very difficult to compel. Direct review by an administrative official could be frustrated by recording a distorted version of the evidence to make it appear that an unpopular rule was being faithfully applied, when in fact it was being ignored. Even absent such distortion, effective administrative review of the vast mass of litigation was impossible within a system which

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226. See, e.g., Hamisi A.C. C.C. 1/66 (Jan. 15, 1966) (claim for one head of cattle pregnancy compensation and Shs. 1,500/- school fees; defendant agreed to pay Shs. 500/- school fees Shs. 177/- court costs and Shs. 23/- transport, which the court approved); Lurambi A.C. C.C. 388/66 (Sept. 22, 1966) (judgment for one head of cattle, customary pregnancy compensation; one sheep for cleansing since the parties were related, and Shs. 800/- school fees); Lurambi A.C. C.C. 441/66 (Oct. 10, 1966) (judgment for Shs. 450/- school fees); Lurambi A.C. C.C. 515/66 (Dec. 21, 1966) (judgment for two head of cattle customary pregnancy compensation and Shs. 700/- school fees; this case was decided after the letter from the A.C.O.); Khwisero A.C. C.C. 153/66 (Aug. 31, 1966) (judgment of Shs. 1,350/- school fees; this court is also subordinate to the Kakamega Appeal Magistrate); Emuhaya A.C. C.C. 78/66 (May 4, 1966) (judgment for Shs. 900/- school fees; this court also falls within the same appellate system). The Kakamega Magistrate who had received the reproof clearly learned his lesson, and in subsequent appeals he reduced all awards to the two head of cattle which traditionally constituted customary compensation. See, e.g., Kakamega Mag. C.A. 128/66 (Apr. 10, 1967), dismissing appeal from, but varying award of, Butali A.C. C.C. 535/66 (July 25, 1966) (original claim Shs. 1,200/-; lower court awarded Shs. 800/-; on appeal reduced to Shs. 300/- representing two head of cattle); Kakamega Mag. C.A. 178/66 (Jan. 3, 1967), dismissing appeal from, but varying award of, Ikolomani A.C. C.C. 312/66 (Aug. 29, 1966) (original claim Shs. 2,000/-; Shs. 1,000/- allowed below, reduced to Shs. 300/- on appeal). However, another magistrate who subsequently sat in the same court was apparently unaware of the ruling. See Kakamega Mag. C.A. 50/67 (Feb. 23, 1968) allowing appeal from Ikolomani A.C. C.C. 388/66 (Oct. 15, 1966) (reversed lower court's award of compensation for pregnancy for lack of evidence, but no mention made of the size of award, which was Shs. 756/- for school fees).

227. This attitude is undoubtedly changing as primary court judges receive more legal education, concurrently adopting Western attitudes, and as the appellate structure is Africanized.

aimed to provide inexpensive legal redress on a balanced budget.[228] Nor was the informal supervision provided by the professional bar in developed countries available, since the Kenya bar was not interested in and in any case had little access to unpublished primary decisions.

Perhaps this somewhat abstract dicussion of the merits and drawbacks of various sources can be given substance by analysis of the progress of an actual case through a series of appeals. For, notwithstanding all the criticisms just offered, I did make extensive use of Magistrate's Appeals, for two quite unrelated reasons.[229] On balance, greater literacy and legal sophistication outweighed any unfamiliarity with or bias against customary law. Moreover, such bias might possess considerable significance for legal development since the Magistrates decided enough cases to have a substantial impact within the legal process. Finally, appellate case files contained a full record of primary court proceedings, as well as the evidence heard and judgment rendered on appeal.[230] Apart from these considerations, however, there was an overwhelming advantage in terms of convenience and efficiency. In the early 1960's the African Courts Officer instructed the Appeal Magistrates to send him a typed carbon copy of every judgment.[231] He has thus collected more than 5,000 judgments handed down since about 1963, which are filed in the Law Courts in Nairobi. I used these materials intensively during the first two months of my field work in order to obtain a synoptic view of the role of customary law in the judicial process. From this source I have deliberately chosen a typical case to illustrate in extreme form the differences in ability and attitude among the several levels of the judicial hierarchy. The parties are all Kamba.[232]

228. District Officers, and subsequently Appeal Magistrates, did have the power to revise any decision of an African Court. African Courts Ord., Laws of Kenya, Cap. 11, s. 44 (rev. ed. 1963) as amended by African Courts (Amendment) Ord., No. 50 of 1962, s. 33. My impression is that, at least in civil cases, this power has not been widely used in the recent past. It was eliminated by the Magistrate's Courts Act, No. 17 of 1967.

229. There were only about a dozen decisions by the Court of Review relevant to my subject during the decade or more that it functioned.

230. As stated earlier, all papers filed in a case are kept in the court which passes the final judgment. In 1966 there were 25 Appeal Magistrates Courts in Kenya: Kiambu, Murang'a, Thika, Kerugoya, Nyeri, Embu, Meru, Machakos, Kitui, Wundanyi, Kilifi, Kwale, Mombasa, Nakuru, Naivasha, Eldoret, Kitale, Kericho, Kisii, Homa Bay, Kisumu, Kakamega, Bungoma, Kapsabet, and Nairobi.

231. These judgments contain a summary of the evidence and decision below, the grounds of appeal, any additional evidence heard, and a reasoned opinion. However, the record is not complete, and testimony and cross-examination are omitted.

232. Nziu A.C. C.C. P278/63 (n.d.), appeal allowed, Machakos Mag. C.A. 98/64 (R. Mullaa, May 5, 1965), appl. to C.O.R. allowed, Machakos District Registry Appl. P30/65 (A.C.O., May 19, 1965), appeal dismissed, C.O.R. Appl. 7/66 (Ainley, C.J., Feb. 9, 1967). The Kamba are a Bantu people numbering about a million, who live in Eastern Province, just east of Nairobi. See Kenya Census, 1962 at 36. All the names used are pseudonyms.

Plaintiff: Paul.

Defendant: John.

Claim: Damage to reputation, Shs. 300/- (Filed Oct. 16, 1963).

Facts: Paul alleged that on 17th September, 1963, he was walking along a road with two old women, Esther and Lidia, on the way to address a political meeting when he was overtaken by John. John asked the women if they were going to vote for him. They replied that they did not consider that he would compete with Paul at the elections. John rebuked them, saying that they should vote for Paul because he gave them *mamwana* (bread toasts) and slept with them. Paul asked John to repeat that, but John refused and rode off on his bicycle. John denied meeting Paul on that date. He said that he was speaking at a different place.

Judgment of the Nziu African Court: For Paul, Shs. 300/- damages. Paul and John held political meetings at different places respectively on that date, but they had met and John had used insulting words to Paul in the presence of the two women.

John's Grounds of Appeal: John again denied meeting Paul on that date and wanted to call an additional witness to support his denial. John also wished to swear a *kithitu* oath[233] to prove his allegations.

Evidence on Appeal: John was allowed to call a witness, Kisuko, who confirmed John's alibi.[234]

Judgment of the Machakos Appeal Magistrate: For John. "Both parties in this case are politicians. During the month when this dispute arose both were contesting for one seat at the Machakos County Council[235] elections. They both belonged to one political party then." The court was convinced that the parties held political meetings at different places on the day involved, but that they did meet on the road. ". . . one thing is that the defendant did not talk to the plaintiff but to the women. The alleged insulting words were said to the women. The question is

233. A *kithitu* is an object on which an oath is sworn; it is alleged to kill a perjurer or his near kin within six months. Traditionally it was greatly feared and highly effective at insuring truthful testimony. See Penwill, *Kamba Customary Law* 56-66 (1951). That it has much less power today is shown by the instant case. John's story was probably false yet he, an educated man, was anxious to swear to it on the *kithitu* in order to impress the more credible primary court.

234. That the court allowed John to call an additional witness who could easily have been produced below shows the readiness of appellate courts to hear further testimony. Compare note 212 *supra*.

235. Machakos District contains well over half of the Kamba, and thus more than half a million people. The position of county councillor is one of considerable status.

whether the alleged words were said by John as claimed by Paul and his witness. And further did the words alleged spoken amount to defamation of Paul's good name. It must be remembered here that the parties were great rivals over an election to a seat at the Machakos County Council . . . In my humble opinion I consider that these words spoken by John were not defamatory to Paul but perhaps would have been so to the two women. This is because John was directly talking to these women, and as the Nziu African Court found the women were disappointed [*sic*] with the defendant's insults to them. I have also considered the circumstances under which the words were spoken. John was trying to convince the women to vote for him at the election. There were no other people around who heard the alleged defamatory words. The two women were the right wing [*sic*] supporters of Paul. . . . the parties have had *fitina*[236] long before this dispute. This *fitina* is still existing." The court refused to allow the oath.

[Paul then applied to the African Courts Officer for permission to submit the case to the Court of Review, which was granted.]

Judgment of the Court of Review: "This was a disgraceful thing to say, but it is quite clear that John was merely being rude and abusive. It scarcely needs saying that the two old ladies would realize that, and there is not the slightest evidence on the record that anyone besides Paul, Esther and Lidia heard these words. The fact is then that Paul's good name was not injured. . . . We wish to say, however, that Kamba custom may possibly permit a man to recover compensation for mere vulgar or scurrilous insults and abuse which have not spoiled his name or lowered his reputation in the community, but which have caused him distress and affront. . . . If there is such a custom, and a man wishes to base his claim on it, he must do so clearly and at the outset of the case so that the trial court knows precisely the issues which it has to try. . . . It is not only a matter of law, it is a matter of common sense that there is a vast difference between saying 'that man was rude and insulting' and 'that man has lowered my reputation and damaged the character which I hold among my friends'. To say one thing is to make, on any showing, a trivial allegation. To say the other is to allege what may be a very serious wrong indeed."

The substantive law in this area is unclear, and probably in a state of flux. Kamba historically had a system of age-grades; although membership had to be achieved by making certain payments, these grades served roughly to divide the male population into groups of coevals.[237] A

236. Jealousy, contention (Swahili).

237. See Middleton & Kershaw, *The Central Tribes of the North-Eastern Bantu* 74-75 (1965).

young man who had been disrespectful towards an elder would be required by his father to make the elder a gift of beer, at least equal in value to a goat.[238] When courts were instituted insulted persons began to seek redress in novel situations, and to ask for money compensation in increasing amounts. Some courts have continued to emphasize the age relationship, restricting recovery to elders insulted by youths,[239] and denying it when the parties are of the same age.[240] Others have extended the cause of action to allow a woman to sue a younger man.[241] A few courts have held older men liable for insulting younger women[242] or men,[243] expressly rejecting the traditional basis of the tort:

> "I am satisfied that the old custom of the Kamba whereby the aged were probably privileged to insult the young ones has died out in these modern civilized periods and days where no one is privileged to insult the other.[244]

But most cases simply grant recovery without any reference to the relative ages of the parties,[245] recognizing that age-grades have lost their traditional significance.[246] Similarly, there is no correspondence today between the

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238. See Penwill, *Kamba Customary Law* 110 (1951). The official value of a goat today for judicial purposes is Shs. 20/-.

239. See, e.g., Machakos Mag. C.A. 156/65 (Dec. 22, 1965), dismissing appeal from Iveti A.C. C.C. 450/65 (Nov. 30, 1965) (defendant said to plaintiff, an old man, in front of eight people, that he had been spoiled by harlots and was a rascal; plaintiff awarded Shs. 200/- damages); Machakos Mag. C.A. 23/66 (Mar. 4, 1966), dismissing appeal from Miu A.C. C.C. 2/66 (Jan. 24, 1966) (defendants, members of an age grade inferior to that of plaintiff, said among other things that he was a dog and should die; plaintiff claimed Shs. 1,000/- compensation and was awarded Shs. 600/-).

240. See, e.g., P1, P2, and P3 v.D. Machakos Mag. C.A. 66/65 (Sept. 21, 1965), dismissing appeal from Miu A.C. C.C. ?/65 (Apr. 30, 1965) (P1 and P3 are of the same age group as the defendant and therefore cannot recover).

241. *Ibid.* (P2, a woman, is older than the defendant and therefore can recover.)

242. See, e.g., Machakos Mag. C.A. 14/65 (Mar. 20, 1965), allowing appeal from Iveti A.C. C.C. ? / ? (Jan. 8, 1965); Machakos Mag. C.A. 34/65 (Aug. 20, 1965), dismissing appeal from Kangundo A.C. C.C. ? / ? (n.d.): "The person abused is a woman and the person who abused her is an old man of about the age of the woman's father . . . I consider that the abusive words used by the defendant are bad [stupid dog, devil, *kino*] and especially when used by a man to a woman of a younger age than the man."

243. Machakos Mag. C.A. 43/67 (June 19, 1967), dismissing appeal from Miu A.C. C.C. 5/67 (n.d.).

244. *Ibid.*

245. See, e.g., Machakos Mag. C.A. 31/65 (Aug. 19, 1965), allowing appeal from Kangundo A.C. C.C. ? / ? (Feb. 15, 1965) (upper and lower courts differed only on whether there was sufficient evidence of the abuse; plaintiff claimed Shs. 150/- for being called a stupid dog, and was allowed Shs. 100/-); Machakos Mag. C.A. 157/66 (Jan. 24, 1967), dismissing appeal from Miu A.C. C.C. 160/66 (n.d.) (plaintiff claimed Shs. 500/- for being called a dog, and was allowed Shs. 300/-).

246. My Kamba research assistant, a second-year student at University College, Dar es Salaam, did not know his age-grade, though he had lived at home until going to the university.

traditional compensation of a goat and the money claims made or allowed.[247]

The Nziu African Court in the instant case apparently followed contemporary notions of abuse, since there was no evidence that Paul and John were of different ages, and since the compensation awarded was worth 15 goats, not one. Its application of those rules, however, showed little insight into the issues raised by the case, nor even an accurate perception of the basic facts.[248] The Machakos Appeal Magistrate wrote a judgment displaying considerably greater juristic ability in identifying and resolving the issues, although his presentation of them is somewhat disorganized. He found three basic questions: had the parties met; had John used the words alleged; did they create a cause of action? The answers to the first two were clearly positive, thus disposing of John's alibi. As for the third, there were two possible claims—customary insult and common law defamation[249]—and the magistrate appears to have understood this distinction, although he tends to use the two terms interchangeably. As a Kamba himself, he recognized the existence of an insult without difficulty. However, the facts in this case did not satisfy an essential element of the action, that the insulting words be addressed to the plantiff.[250] Treating Paul's complaint as one for defamation, the court again rejected it, on alternative grounds. First, it did not satisfy the common law requirement of publication and damage because the only persons who heard the defamatory words were Paul's own supporters. Second, the "circumstances under which the words were spoken" were such as to preclude an action for damages: the litigants were both politicians, members of the same party, between whom there had long been

247. See cases cited in notes 239–45 *supra.*

248. As the Magistrate correctly noted, John had not used insulting words to Paul, but to the two women.

249. One of the most fascinating aspects of the evolution of customary law in Kenya is the gradual introduction of common law actions, for which there is no legal basis whatsoever. The African Courts Ordinance which grants the courts jurisdiction quite clearly states that the law to be applied is the "African customary law prevailing in the area" (with other rules and statutes not relevant here). Laws of Kenya, Cap. 11, s. 18(*a*) (rev. ed. 1963). Nowhere were such courts authorized to administer the common law. Nevertheless, actions for "defamation" are widespread throughout Kenya, as are other claims clearly based on the English common law, e.g., breach of promise of marriage, negligence, assault. I have never seen any discussion of this point, even in those cases which reached the Court of Review. Indeed in the instant case the Court of Review rejected a customary claim because it did not accord with the common law, although the governing statute required it to do just the opposite.

250. The magistrate's recognition of this point shows that he was talking about a distinct customary action for insult, since personal confrontation is not a requirement of defamation. However, he may have been wrong that it is necessary in insult. See Machakos Mag. C.A. 23/66 (Mar. 4, 1966), dismissing appeal from Miu A.C. C.C. 2/66 (Jan. 24, 1966) (plaintiff was not present when defendants uttered the words).

ill-feeling; John uttered the words prior to a hotly contested local election in order to persuade the women, supporters of his opponent, to vote for him instead. The magistrate is here clearly seeking for a policy which might support a justification for defamation, although he never succeeds in making it explicit.[251]

The Court of Review reached the same conclusion but by a divergent route which revealed its premises to be fundamentally different from those of the two lower courts. There could of course be no liability in defamation because the words were only published to the two old ladies who would recognize them as abusive and not defamatory.[252] Where this court differed from the others was in its attitude towards abuse. It had little sympathy with an action for "*mere* vulgar or scurrilous insults and abuse" [my italics] for it was a matter of "common sense" that such conduct was "trivial" when compared with words injurious to reputation which "may be a very serious wrong indeed". Although customary actions could not be abolished[253] the court was determined to hedge them about with procedural impediments: plaintiffs would be required to state clearly and precisely at the outset of the case the customary rule on which they wished to rely. This is in sharp conflict with the generally informal practice of the primary courts, whose official rules have never demanded strict pleading,[254] and is indeed in violation of the express language of the governing Act.[255]

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251. Cf. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

252. It is unclear where in the common law the court finds such a rule. It is clearly defamatory of a man to say that he sleeps with other women. Perhaps the court is arguing that the women would not believe such accusations, and hence would not lower their estimate of Paul as a result.

253. Courts may refuse to apply a customary law which is "repugnant to justice or morality", but the granting of compensation for abuse is hardly such a rule. African Courts Ord., Laws of Kenya, Cap. 11, s. 18(*a*) (rev. ed. 1963).

254. See African Courts Civil Procedure Rules:
    s. 4. Filing of case: When a plaintiff wishes to file a civil action, *the clerk shall open a "Case File" and shall record briefly in the space provided thereon the substance of the claim . . .*
    s. 34. The Plaint: The plaintiff shall give his evidence . . . At the close of his evidence he may be questioned by the court and cross-examined by the defendant. *From this evidence the court shall reduce to writing and enter the Particulars of the Claim in the place provided in the "Case File."* [emphasis added].
    Aside from the fact that these rules appear to be mutually inconsistent, it is ironic that they were promulgated by the Chief Justice of Kenya, who also wrote the opinion for the Court of Review in the instant case, under his authority derived from the African Courts Ord., Laws of Kenya, Cap. 11, s. 62(1) (*a*) (rev. ed. 1963).

255. African Courts Ord., Laws of Kenya, Cap. 11, s. 54 (rev. ed. 1963):
    No proceedings under this Ordinance in the Supreme Court, the Court of Review, a magistrate's court or any African court . . . shall be varied or declared void upon appeal, revision or review solely by reason of any defect in procedure *or want of form*, but all matters shall be decided according to substantial justice without undue regard to technicalities. [emphasis added].

These three judgments thus characterize, and perhaps even caricature, the approaches of the several levels of the judicial hierarchy. Primary court judgments, while most significant from the point of view of numbers, may be empty of reasoning, and even misleading in the statement and interpretation of rules. The Appeal Magistrate here made a highly sophisticated application of customary rules to the facts of the particular dispute. Indeed, he went beyond this and sought to adapt customary law to changed conditions, balancing the traditional concern to protect personal dignity by penalizing disrepectful behaviour against the modern desire to foster democratic government by allowing the freedom to compete for political allegiance through the use of loose language if necessary. However, innovative decisions like this are rare and have a doubtful impact on the daily operation of the law. Finally, the opinion of the Court of Review, while expressed with more elegance and better organization, showed an unfortunate insensitivity to customary legal principles and indigenous cultural attitudes. In a small-scale society the man who is subjected to abuse may well suffer a greater loss of self-respect and of standing in the community than the man who is defamed.[256] It is strange that the CHIEF JUSTICE should have been so ignorant of this fact when, little more than a century ago in England and throughout Europe, equivalent words would have been cause for a duel, possibly leading to the death of one of the participants.[257] But regrettably such incomprehension is not unusual: lack of respect for differing values is always a danger when a person of one culture is required to pass judgment on the behaviour of someone from another. A display of even more serious ethnocentrism may be found in a similar case of customary abuse. Although the European magistrate allowed the "trifling" damages he considered appropriate to what he viewed as a "childish" case, he wrote:

> "This is a typical storm in a tea cup so typical of the Somali people. . . . In my opinion it was a vulgar slanging match and not calculated slander."[258]

Not only did the magistrate fail to see that abuse, and not common law slander, was the gravamen of the complaint, but he mistakenly assessed the "trifling" damages by his own economic standard and not by that of people living at a subsistence level. Although this statement, and the opinion of the Court of Review in the principal case, are unusually egregious examples of cultural blindness, they should stand as a warning against over-ready acceptance of the pronouncements of European judges

256. The vast number of complaints about abuse should be sufficient evidence of this. See statistical analysis, *supra*.

257. This is still true in many parts of Europe today. See generally, *Honour and Shame* (Peristiany ed. 1965).

258. Kakamega Mag. C.A. 24/64 (Oct. 28, 1964), dismissing appeal from Lurambi A.C. C.C. 207/64 (n.d.).

on customary law. For it is hardly surprising that primary courts do not, in practice, share this concern with reputation rather than public dignity or self-respect, but continue to award compensation, substantial in the eyes of the parties, for "mere" abuse or insult.[259]

VI. Extra-Judicial Dispute Settlement

The foregoing discussion has, I hope, justified my decision to rely on reports of actual disputes in investigating customary law. Case analyses have demonstrated that the files of primary courts, and to a lesser extent those of appellate courts, contain a wealth of information about substantive rules and their judicial application. Statistical analysis indicates that the courts deal with a very large number of cases, both absolutely and in relation to population. But I do not wish to suggest that the approach chosen discloses more than a small fraction of the controversies which arise and are resolved in the course of social life. In every society families are able to settle many disputes internally, other groups have the means to reconcile contentious members, and even strangers may compromise their differences outside of court. Throughout Africa, a substantial proportion of disputes may never reach court because each community possesses traditional, extra-familial institutions for mediation. In Kenya these include the Kikuyu *kiama*,[260] the Kamba clan or *utui* elders,[261] the Luo *joduong' gweng'* or *anyuola* elders,[262] the Luyia *liguru*,[263] the Gusii *etureti* elders,[264] and the Nandi[265] and Kipsigis[266] *kokwet*. These are not, of course, structurally identical or of equal functional importance; moreover the jurisdiction and effectiveness of each has everywhere declined under the successive impacts of colonialism and development. Nevertheless the influence of the elders is still considerable. I referred to it earlier to explain why so few Luo controversies between villagers are brought to court; indeed, the continued vitality of indigenous autho-

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259. See cases cited notes 239, 242, 243 and 245 *supra*, and Machakos Mag. C.A. 33/66 (Mar. 23, 1966), dismissing appeal from Kilungu A.C. C.C. 465/65 (Feb. 11, 1966) (plaintiff claimed Shs. 100/- because defendant had called him a fool, *shenzi* (savage—Swahili), etc., and got full amount) and Machakos Mag. C.A. 112/64 (Nov. 17, 1964), allowing appeal from Nziu A.C. C.C. ? /64 (n.d.).

260. See, e.g., Kenyatta, *Facing Mount Kenya* 217 (1938); Lambert, *Kikuyu Social and Political Institutions* 80–84 (1956).

261. See, e.g., Penwill, *Kamba Customary Law* 10,122 (1951).

262. See, e.g., G. Wilson, *Luo Customary Law and Marriage Laws Customs* 12–13 (1961).

263. See, e.g., Humphrey, *The Liguru and Land* 14–15 (1947). This is the term used in Idakho and Isukha locations; other dialect variations are *ligutu*, *likuru*, *lokalupo*, and *omukasa*. See G. Wagner, I *The Bantu of North Kavirondo* 77–78, 80 (1949) [hereinafter cited as I Wagner].

264. See, e.g., P. Mayer, *The Lineage Principle in Gusii Society* 18 (1949).

265. See, e.g., Snell, *Nandi Customary Law* 10 (1954).

266. See, e.g., Peristiany, *Social Institutions of the Kipsigis* 176 (1939).

rities may be one of the most significant factors affecting patterns of litigation. The African Courts Ordinance[267] gave explicit approval to "customary arbitration and settlement by the tribal elders", and primary courts today continue to reinforce their authority. Many require the parties to submit to arbitration before initiating litigation: the failure of a plaintiff[268] or defendant[269] to do so may prejudice his case. In the Luo case discussed in Part I the court noted that the plaintiff had bypassed the *joduong' gweng'*, although it did not penalize him for this. Whether or not there has been a preliminary submission to the elders, the court may send the case to them.[270] Their views are given considerable weight, and will often determine the outcome.[271]

Although cognizant of the significance of extra-judicial dispute settlement, I chose to concentrate on court proceedings instead. My legal skills were better adapted to the analysis of cases, and I lacked the anthropological and linguistic training to observe informal arbitration, which of

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267. Laws of Kenya, Cap. 11, s. 32 (rev. ed. 1963). The failure of the Magistrate's Courts Act, No. 17 of 1967, to contain a comparable provision cannot be taken to intend any limitation on the work of traditional elders.

268. See, e.g., Emuhaya A.C. C.C. 162/66 (Mar. 16, 1967). Plaintiff sued defendants for compensation for banana plants he alleged they had cut down. The court asked him why he had failed to report the matter to his *liguru*, and he claimed that he had, but that the *liguru* had refused to visit the site. One of the defendants replied that the *liguru* had originally ordered the bananas cut because they had been planted on an official road. The court found for defendants, obviously impressed by plaintiff's failure to consult the *liguru* and secure his support. But see Kiambu Mag. C.A. 45/66 (Mar. 7, 1967), dismissing appeal from Kiambu D.A.C. C.C. 65/66 (Feb. 24, 1966). There defendant appealed an award of pregnancy compensation on the ground that plaintiff had failed to submit the dispute to the elders for discussion before sueing. The court commented: "It was quite in order to file the suit even before John and Grace [the couple involved] had discussed the pregnancy."

269. See, e.g., Lurambi A.C. C.C. 527/66 (Dec. 1, 1966) ("Plaintiff's allegation has not been rebutted that he called Namale before the *liguru* but Namale failed to appear. The court accepts the decision of the *liguru* that Namale pay Shs. 50/- . . ."); Iveti A.C. C.C. P283/66 (Aug. 22, 1966.) Elders in the latter case attempted to settle the dispute on three occasions. First defendant refused to choose an elder to represent him; then he appeared very late at the second hearing without an elder; and finally, after the court had referred the case back to the elders, he did not give them time to consider the claim. The court found for plaintiff, stating: "We consider Kakulu's refusal to allow the elders to help the court [to be] discourteous and for this we accept that there was a sort of damage." Cf. Doho Kosele A.C. C.C. 155/66 (Aug. 10, 1966). The court found for defendant on the basis of the decision of the *anyuola* elders, but then turned around and fined defendant for failing to appear at the discussion before those elders, and awarded the fine to plaintiff.

270. See, e.g., Iveti A.C. C.C. P283/66 (Aug. 22, 1966); Iveti A.C. C.C. P493/66 (Jan. 1, 1967) (case referred to *utul* elders by the court; they found the evidence inconclusive and returned the case to the court, which decided to dismiss plaintiff's claim for lack of proof).

271. See cases cited notes 268–70 *supra*, and Lurambi A.C. C.C. 568/66 (Feb. 9, 1967); Maseno A.C. C.C. 181/66 (Sept. 26, 1966) ("The court believes defendant's evidence, which was confirmed by the testimony of the local elder . . .").

course was not recorded in writing.[272] Furthermore, I felt that the neglect of judicial records by past investigators, legal or anthropological, constituted the most important gap in our understanding of the operation of customary law. Consequently, I did not study out-of-court settlements with the degree of comprehensiveness that I sought in collecting court cases. Still, I wanted to gain some perspective on the role of the courts within the wider framework of dispute settlement by exploring extant unofficial institutions and their mode of operation. Two kinds of documentary sources were available, anthropological monographs and accounts of arbitrations contained in the reports of subsequent judicial decisions. I sought to supplement these materials with fieldwork conducted by research assistants:[273] five university students employed during the long vacation to work at their homes where they were known to the local inhabitants, somewhat familiar with the customary law, and of course fluent in the vernacular. They were guided by a fieldwork manual describing the nature of the disputes to be studied[274] (with a list of examples) and the data to be recorded about each. Research method varied according to the local situation and the abilities and personality of the investigator; in Nyeri District he attended the primary court[275] and discussed the antecedents of disputes with litigants; in Kakamega he spoke to the local *magutu*[276] and sub-chief who resolved most minor disputes; in Central Nyanza he observed the sessions of the locational Land Adjudication Committee,[277] composed largely of local elders; in South Nyanza he talked with friends and relatives about family and clan controversies in the neighbourhood. Each provided me with an account of about a hundred disputes, a few observed first-hand, but most related by other participants —litigants, witnesses, or mediators.

272. Today the elders may summarize the proceedings in writing, particularly if an agreement is reached. See, e.g., Kiambu Mag. C.A. 124/66 (Aug. 31, 1966), ordering re-hearing on appeal from Githunguri A.C. C.C. 479/66 (n.d.) (agreement between parties to suit for pregnancy compensation as to the date of intercourse and expected date of birth); Kiambu Mag. C.A. 146/65 (May 5, 1966), allowing appeal from Githunguri A.C. C.C. 756/65 (n.d.) (same). Indeed, failure to insist on a written record may preclude a party from alleging an oral agreement as a defence. See Mukurweini District Magistrate's Court C.C. 42/68 (Mar. 26, 1968) described *supra* note 210.

273. This fieldwork was supported by a grant from Yale Law School. My assistants were: Donald W. Kaniaru, South Tetu location, Nyeri District (Kikuyu); Tom Mbaluto, Iveti location, Machakos District (Kamba); Robert Agufa Endusa, North Maragoli location, Kakamega District (Luyia); Luke Wasambo-Were, East Gem location, Central Nyanza District (Luo); and John C. N. Otula, East Karachuonyo location, South Nyanza District (Luo).

274. See note 194, *supra*. I am grateful to Professor Laura Nader for letting me see a copy of the field manual which she compiled for the Berkeley Comparative Villages Law Project, on which I drew in preparing my own.

275. Mukurweini District Magistrate's Court.

276. Plural of *ligutu*, the elder who traditionally mediated disputes.

277. Appointed under the Land Adjudication Act, No. 27 of 1959, Laws of Kenya, Cap. 283, s. 9 (rev. ed. 1964).

Differences among investigators—in personality, method, and social environment—produced materials too heterogeneous for capsule summary here. I offer a sample nevertheless to illustrate the kind of data obtained: the subject matter, its detail, and its pertinence to an understanding of the role of the courts. The parties are Maragoli, a Luyia sub-tribe,[278] and residents of the investigator's village; though he did not observe the initial incident, he was present at the hearing. The version I give is drawn from the report he wrote, expanded by means of subsequent discussions with him.

Resba Musindi, a young married woman, member of the Friends' Church,[279] has three sons and a daughter. She lives at the home of her husband, though he is away working in Nairobi. Throughout the village she has the reputation of being a mean, quarrelsome person.

One evening in August, 1967, she returned to her house to be told by her daughter that two of the boys, aged five and seven, had put sugar in their lunchtime porridge in her absence. It was not unusual for them to have sugar, but in this case they had done so without her permission. Furious, she tied their hands and pushed them into the hot embers of the fireplace to punish them. Though she did not intend a serious injury, they were very badly burned and ran screaming to their father's mother. When their grandmother understood what had happened she too started crying and abusing her daughter-in-law. Her cries attracted neighbours who rushed to the scene. When they questioned Mrs. Musindi about her action, she resorted to abusive language. The neighbours then advised the grandmother to take the matter to the *ligutu* of the village. Unfortunately, he was absent, and Mrs. Musindi took advantage of this to depart secretly for her parents' home.

The *ligutu* was informed on his return that night, and called a *baraza*[280] of village elders. It met the next morning and decided it could take no action until Mrs. Musindi was brought back and her husband summoned from Nairobi. It advised that the children be treated at the local health centre.

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278. The Luyia are a Bantu people, numbering just over a million, see Kenya Census, 1962, at 36, who live in Western Province, between Lake Victoria and Mount Elgon, composed of 14, see Goldthorpe & Wilson, *Tribal Maps of East Africa*, Map 6 (1960), or of 17, see Cotran, *Restatement of African Law, I Kenya: The Law of Marriage and Divorce* xvii (1968) subgroupings. The Maragoli are one of the most important sub-tribes, situated in the south-eastern corner of the area, about 30 miles north of Kisumu. The names of the parties are pseudonyms.

279. The Friends Mission at nearby Kaimosi was founded in 1902 and has had a wide influence throughout this area. See Sangree, *Age, Prayer and Politics in Tiriki, Kenya* 120–21 (1966).

280. Meeting (Swahili).

Mr. Musindi arrived from Nairobi, a little over 200 miles away, on a Saturday, and the case was heard the following day. The *ligutu* approached the sub-chief[281] to send his K.A.N.U. Youth Wingers[282] to Resba's home to arrest her. The meeting sat under the trees near the local primary school. In addition to the *ligutu* of the village, *magutu* from neighbouring villages had come, as well as many other people. Mrs. Musindi was accompanied by some of her fellow clansmen from home, but they did not speak in her support. The village *ligutu* stated the charge against her—burning the children was a punishment too severe for such a small offence; she should have caned them instead.

Mrs. Musindi, though angry at being arraigned by their husbands' clan, was clearly penitent about the act now that her anger had cooled, and simply admitted her guilt. The two boys were asked to testify, and said that they were used to sugar in their porridge, though it was always their mother who put it in for them. Their grandmother, who had had custody of the children since the incident, sharply criticized her daughter-in-law. Hadn't the sugar been bought with money provided by her son for the support of his children? Mr. Musindi repeated this; he had always tried to send money home for his family at the end of the month. Why had his children been treated like this? But he also urged the assemblage not to demand a heavy punishment, since his wife was a first offender.

Despite Mr. Musindi's pleas for leniency, speaker after speaker then rose and demanded a heavy penalty. Such an act, they said, had never been known to happen in the time of their grandfathers. The *ligutu*, seeking to learn and mobilize public opinion, asked for recommendations of specific sanctions. At first many urged that Mrs. Musindi be burned in a like manner. But others argued that this would incapacitate her from taking care of her children. Moreover, no one seemed disposed to execute the punishment; each feared he might be prosecuted under the Penal Code in official court. Some may also have been moved by the knowledge that there was an unfortunate precedent for the woman's act. Mr. Musindi had himself suffered a serious cut on his finger inflicted by his own mother in one of her periodic outbursts, for the principal prosecution witness was herself a very quarrelsome woman.

The alternative adopted was a money fine. This was to be paid by Resba's father, rather than her husband. It was ostensibly for the public benefit, but was, in fact, consumed by the *magutu*. The amount

281. The lowest administrative official, in charge of a sub-location.

282. Kenya African National Union, the ruling political party.

was determined partly by the heinousness of the offence, and partly by the economic standing of Resba's father, who was known to be very poor. After much discussion, it was fixed at Shs. 150/-. This was to be paid in two weeks, failing which Resba would be charged with assault in the chief's court.[283] The whole proceeding had taken more than five hours.

As the people dispersed, there was a certain amount of grumbling at the sentence, which many thought too light. Innocent children had been maimed forever, a disservice to the community. Several women vowed never to associate with Mrs. Musindi again. But any threat of actual violence against her was quashed by her husband, who asserted his intention to protect her. Mrs. Musindi managed to get Shs. 100/- from her father within two weeks, and thus was not taken before the chief. She has not paid the rest, and may never be asked for it. She and her husband live together happily, and her children have recovered the use of their fingers, though they still bear scars and are missing their nails. They fear their mother, but are too young to harbour any permanent resentment.

In this dispute, unlike those discussed earlier, neither the facts nor the law were in controversy. Mrs. Musindi had intentionally burned the hands of her children. Although parents do have authority to discipline their off-spring by physical chastisement the injury inflicted here was far out of proportion to the misbehaviour.[284] Our interest is therefore in the choice of persons and processes to resolve the conflict. An intra-family dispute like this one can usually be settled internally. Had Mr. Musindi been home, the initial burden of corrective action would have fallen on him; in his absence his father or an elder brother might be expected to substitute: Mrs. Musindi might have been soundly beaten and the passions of family and clan thus pacified.[285] Apparently, however, there was no man who could deputize as family head; the shortage of land in Maragoli and the attractions of wage-labour in the cities have deprived the location of many of its adult males.[286] In consequence, not only were persons outside the family drawn into the dispute, but the delay in resolving it led to reliance on formal procedures involving a more severe penalty.

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283. The chief administers a location. He has no official judicial authority, but his much greater influence, backed by the use of Administrative Police, may often achieve a settlement.
284. See I Wagner 46.
285. See *Id.* 44, 46, 49.
286. The population density for all of North Nyanza District is 506 persons per square mile, but this includes under-populated areas around Mount Elgon. Maragoli itself must have two or three times this density. See Kenya Census, 1962, at 20–21. In 1962, 15 per cent of all Luyia lived outside both North and Central Nyanza. *Id.* at 35.

The children's grandmother was the first to intervene. Among the Luyia, as in many African societies,[287] children look to their grandparents for protection against harsh parents, and generally for indulgence. Because marriage occurs between exogamous localized sub-clans and residence is virilocal,[288] a child's father's parents are most often involved. The grandmother had an additional interest in the present case. In this primarily patrilineal society children belong to their father's lineage; a young wife is an outsider, and any interference with the rights of the lineage is deeply resented.[289] This was made clear by the reaction of the audience at the later hearing. Active concern by the grandmother was thus proper for several reasons; moreover, she had been summoned by the children. Inquisitive neighbours could claim no such justification; nevertheless, those within earshot felt no hesitation about gratuitously offering their assistance. Such a small-scale community allows little privacy; gossip and controversy provide the principal spice of life, and every disturbance attracts many observers, who are quickly transformed into participants. However, it is interesting that neither the grandmother nor the neighbours felt capable of proceeding beyond abuse in order to settle the matter. Rather here, as throughout the controversy, the participants appealed to ever more powerful authorities until they had applied sufficient pressure to persuade Mrs. Musindi to accept the judgment of public opinion. This progression is characteristic of dispute settlement in the absence of coercive force, which cannot succeed until the sanctions threatened for non-compliance outweigh the distastefulness of the demands being made.

The *ligutu*, to whom the people turned next, is the principal arbiter of cases settled out of court. Traditionally he was the head of a lineage segment, the eldest son of its senior line.[290] Today, however, the sub-chief appoints *magutu* from each of the sub-clans in a sub-location, and can dismiss them at will. Nevertheless, the characteristics of the position have not changed substantially. *Magutu* have no governmental status, and earn no salary, but instead receive a substantial gift from the litigants, usually in the form of food and beer. As in pre-European times, they are still guided by public opinion in reaching a decision, and rely largely on that diffuse sanction for enforcement. The *ligutu* here acknowledged this dependence by summoning a meeting of the elders of the village as soon

287. See Radcliffe-Brown, "Introduction" to *African Systems of Kinship and Marriage* 28 (Radcliffe-Brown & Forde ed. 1950).
288. See I Wagner 56, 383.
289. See I Wagner 43–45. A wife never becomes a member of her husband's lineage, and consequently acquires no rights over her children. That the husband's lineage is fiercely jealous of its rights is shown in the frequent battles over custody of children between husband and wife.
290. See Humphrey, *op. cit. supra* note 263, at 14–15; Wagner, II The Bantu of North Kavirondo 87 (Mair ed. 1956).

as he was informed of the dispute. This group also felt unable to resolve the matter, especially since it could no longer compel the appearance of Mrs. Musindi, who had by now taken refuge with her father in another village. Instead, they sought the assistance of the sub-chief. According to strict law, he too lacked coercive powers, and should properly have asked the chief for Administrative Police to arrest the woman. However, he was not willing to disturb the chief over such a trivial incident, and was anxious to avoid initiating a criminal proceeding. Moreover, like other sub-chiefs in Western Province, he had sought to increase his authority by creating a private, unofficial police force drawn from the youthful supporters of the ruling political party. The consequence is to transform the *magutu* and sub-chief from arbitrators into judges.

This dispute was thus passed from children to grandmother to neighbours to *ligutu* to the sub-chief and his youth-wingers before it was even possible to secure the presence of both sides at a hearing. Yet the co-operation of still more people was necessary in order to reach a decision. Each of the original disputants brought representatives: Mr. Musindi spoke for his children and their lineage; men were present from the lineage of Mrs. Musindi's father. The *ligutu*, anticipating difficulties in resolving the controversy, called for the help of his fellow *magutu* from nearby villages. Except in the most trivial case outside *magutu* will generally be summoned to serve as more impartial arbiters. But the influence of the *magutu* in turn rested on their ability to mobilize public opinion in favour of a compromise solution which the disputants could be persuaded to accept. Consequently, the most important element at the hearing was the public.

Once the required people had been assembled, their sole task was to discover a penalty agreeable to both sides, since Mrs. Musindi had already conceded both the fact of her conduct and its wrongfulness. In fact, the hearing itself represented the principal penalty. For five long hours each member of the community restated the ideals of conduct, condemned the behaviour of the defendant, and vented any private grievances he had against her. Ethical standards were reaffirmed, the desire of the public for revenge was satisfied, and similar conduct was deterred. Moreover, the fact that Mrs. Musindi bore this all meekly showed at least some willingness to reform. This accomplished, a compromise could be reached between the two extreme positions. On the one hand, Mr. Musindi could not simply be allowed to forgive his wife, for this would suggest condonation of her conduct and leave unsatisfied the interests of the lineage in the well-being of its members. On the other, the demands of certain hotheads for talonic sanctions could not be granted, for these might invite police intervention, thus endangering the whole informal procedure, incapacitate Mrs. Musindi from caring for her

children, and preclude reconciliation. Therefore a money fine was chosen, to give material form to the communal disapproval already voiced and to provide the *magutu* with remuneration for their services. Such a solution could only succeed with the co-operation of all concerned. The agreement of Mrs. Musindi was necessary because the *ligutu* did not have customary authority to order payment of more than five chickens, the equivalent of Shs. 25/-. By paying the bulk of the judgment she showed her acceptance of the rightness of the decision. At the same time, the acquiescence of the *magutu* in this partial payment demonstrated their willingness to recognize a good faith expression of repentence. Finally, the public agreed to the decision by abstaining from further action in the form of self-help or legal redress. Only a few individuals intended to persist in ostracizing Mrs. Musindi, and undoubtedly they forgot their resolve after a time.

To understand why these persons and institutions were involved, and this remedy chosen, it is necessary to consider the judicial alternatives; for just as the availability of informal procedures affects the functioning of official courts, so the reverse is true. Had the sub-chief's "police" been unable to produce Mrs. Musindi, or had she refused to bow to public opinion at the *magutu's* hearing, the chief of the location might have been approached. He could have made one further attempt at conciliation, but would more probably have had Mrs. Musindi arrested by his Administrative Police, thus setting in motion the machinery of the law. The civil court, in this case the Hamisi District Magistrate's Court, could then offer two remedies. Mr. Musindi would have had adequate grounds for divorce,[291] and this was the preferred traditional solution. But, though some of the older members of the audience decried this departure from tradition, none of the principal parties favoured divorce. For Mrs. Musindi, it would have meant the loss of her children; for her family, the loss of her brideprice, most of which would have to be repaid;[292] for her clan, a possible reputation for making bad wives, diminishing the prospects for marriage and the accompanying brideprice. Her family and clansmen were in fact present at the arbitration to vouch for her future good conduct, and thus stave off these dangers. Ultimately, the reason why the remedy of divorce was not entertained was that Mr. Musindi wanted to keep his wife; some muttered that his tolerance was due to her similarity in temper with his own mother. The civil court could also have awarded money damages for the burns. But such a suit is expensive, and the identity of the appropriate parties presented some

291. See Cotran, *op. cit. supra note 278, at* 54, 57 (failure of a wife to carry out her duties, one of which is to care for her children, is grounds for divorce).

292. See I Wagner 442–44; Cotran, *op. cit. supra* note 278 at 57. A number of cattle would be deducted from those to be returned depending on the number of children.

questions. The children were too young to sue for themselves.[293] Had their father acted as plaintiff, it would have seemed that he was trying to benefit from the sufferings of his own children; moreover, his action would have alienated his wife, with whom he wanted to be reconciled. Mrs. Musindi probably had no property of her own from which to satisfy a judgment.[294] Her husband clearly could not be both judgment debtor and creditor, and it is not likely that a modern magistrate would hold a married woman's father liable for her wrongs.[295] A second alternative, criminal prosecution, was explicitly considered by the meeting and rejected because it would leave all of Resba's children without anyone to care for them while she languished in jail.[296] In addition, since her husband was willing to forgive her, jail would have satisfied no one and have merely perpetuated the ill-feeling. Because the suit concerned an intra-family wrong, the parties were amenable to compromise—they wanted to preserve the relationships existing among them—and compromise alone offered the promise of a lasting solution, for coercion would certainly have embittered them beyond any possibility of reconciliation.

While there were thus persuasive reasons for not invoking official procedures, access to the courts and their authoritative sanctions undoubtedly affected the conciliatory process. Resort to self-help was severely limited. Mr. Musindi could have beaten his wife, had he been present; but his co-villagers could no longer make a retaliatory raid on her village nor was anyone of them even willing to risk wreaking personal revenge on her once she appeared at the hearing. At the same time, the pressure of public sentiment for a compromise, on Mrs. Musindi and her family, was strongly reinforced by the availability of civil and criminal redress for her wrong.

VII. Conclusion

This article has described the methods employed in investigating the customary laws of wrongs in Kenya, and has tried to show that some of the tentative conclusions drawn from this research may offer valuable

293. Cf. Kisii Mag. C.A. 40/63 (N. K. Nyang'era, Mar. 15, 1965), allowing appeal from Gesima A.C. This was an assault case between two young boys about ten years old. The court reached the merits of the claim, but in the process commented: "It should have been plaintiff's parents who sued defendant's parents since the parties were young."
294. In traditional custom, a Luyia wife could own no property. See I Wagner 45.
295. The situation is further complicated by the fact that both the husband and the father of a married woman are jointly liable for her wrongs. See I Wagner 47.
296. The offence could have been prosecuted under the Penal Code, s. 251: assault causing actual bodily harm. The typical punishment is several months' imprisonment. See, e.g., Kakamega D.A.C. Cr.C. 1352/66 (Nov. 19, 1966) (Shs. 100/- fine or two months imprisonment and Shs. 116/- compensation and costs); Kakamega D.A.C. Cr.C. 1332/66 (Nov. 8, 1966) (Shs. 200/- fine or four months imprisonment and Shs. 50/- compensation).

insights into the nature and functioning of African legal systems. I have argued that analysis of the entire content of individual case files, including both evidence and judgment, leads to a much more sophisticated statement of substantive rules than can be elicited from an informant. Moreover, only such analysis can reveal the application of rules to characterize, imply, and contradict facts—in the strategies of litigants and in the reasoning of judges—which I believe to be the central concern of the judicial process. However, detailed consideration of individual decisions must be placed in proper perspective in two possible dimensions, horizontal and vertical. First, how does the behaviour of these litigants, the nature of this claim, and the reaction of this court compare with the norms for this type of litigation; this can be learned from statistical analysis of the business of the primary courts. Second, what is the role of these courts in the broader framework of dispute settlement—both prejudicial arbitration and appellate review. When case studies are supported by this kind of information they combine the essential criteria of depth and representativeness.

Chapter 3. A Comparative Theory of Dispute Institutions in Society

I. INTRODUCTION

Why study the legal systems of other times or places? Are there reasons beyond an antiquarianism or exoticism that seeks stimulation for a palate jaded by preoccupation with the minutiae of American law? The increased understanding to be gained by such intellectual exploration seems to me similar in origin to the pleasure any of us takes in travel. Differences of physical environment, modes of social intercourse, or patterns of culture awaken us to phenomena which at home are so familiar as to be almost invisible. When we resume our mundane round, the residue of such impressions compels us to recognize the contingency of our own ways, and leads us to look for explanations.

Although the scholarly tradition of speculation about alien legal systems is long and distinguished, with roots in classical philosophy, Montesquieu is generally credited with the revival of such studies in the modern era, having journeyed imaginatively both in time and space (Montesquieu, 1949; Ehrlich, 1916). Inquiry into the past reached maturity in the historical jurisprudence of the nineteenth century (*e.g.*, Maine, 1950; *see generally* Pound, 1923; Kantorowicz, 1937). Academic interest subsequently shifted to the anthropological exploration of contemporary exotic societies through extensive fieldwork.[1] More recently, sociologists have turned inward to examine neglected regions of our own law — the unofficial behavioral patterns discernible within every agency that administers official rules, the innumerable non-governmental legal systems functioning throughout our society.[2]

Nevertheless, the corpus of social theory concerned with legal institutions is small, and what little there is rarely encompasses contemporary non-Western societies. Anthropology and history abound in empirical description but are notorious for their unwillingness to theorize; though sociology consistently strives to develop theory it has been parochial in its geographic and historical scope. This essay grows out of my efforts to understand the development of a particular legal system, that of Kenya — a plural society which experienced rapid change under the impact of colonial rule, change that has further accelerated with the advent of independence. But here I have subordinated that immediate objective to a programmatic goal. Rather than contribute yet another case study to the proliferating literature in the ethnography of law,[3] I have sought to synthesize that literature in order to give a sense of direction to further research, my own and others.[4] I will set forth several alternative approaches and state explicitly my reasons for choosing a particular path, although I make no pretense of having achieved a comprehensive theory.

I begin with the most elementary of problems: How are we to understand the diversity of legal systems we discover through historical and comparative study? First, what differences seem important, and what concepts shall we use to describe and categorize them? I choose to concentrate upon one set of variations — the ways in which disputes are handled. I then consider where we might turn for an explanation of those differences. What factors seem likely to be causative? I conclude that certain structural properties of the dispute are highly significant — in particular, the role of the person who intervenes in the dispute. I therefore develop three related microsocial theories which explain the characteristics of a particular dispute process in terms of the role of the intervener; from these I derive a large number of structural and processual variables which are intended to provide the elements for a set of working hypotheses. This constitutes the framework within which to answer that half of my original question which concerned the internal organization of dispute institutions: we will explain behavior within a particular dispute in terms of its structure. I then turn to the other half of that question, which concerns the relationship between such institutions and the larger society.

In much more tentative fashion I offer a macrosocial theory to explain, in terms of social structural variables, what kinds of dispute institutions will be found in a given society and with what frequencies, and how change in those institutions is related to change in social structure.

II. CHOICE OF A CONCEPT: WHAT IS TO BE STUDIED

A. Law

Many scholars have approached social phenomena in other societies by asking whether they are "law." Implicit in such questions is the choice of "law" as the subject of inquiry, and the concept by which to describe differences and similarities between societies. It is not surprising that these pioneering efforts to develop comparative social theory about legal phenomena should draw their conceptual apparatus from commonsense discourse;[5] parallels can be found in the early history of the natural sciences, as well as in the contemporary travails of social science. We may evaluate the selection of law by a variety of standards. A concept must, of course, have meaning, *i.e.*, an ascertainable and agreed content. In addition, I will adopt other criteria which are not so generally accepted. I prefer to use concepts which can apply across as broad a spectrum of societies as possible.[6] Greater variation increases the opportunities for testing the hypothesis; the more such tests it survives, the greater is its explanatory power (Stinchcombe, 1968: 19). I will also seek to define concepts so that they are not dichotomous, *i.e.*, restricted to polar values (Stinchcombe, 1968: 28-30). The differences we discern among social actions seem to me to be continuous, and therefore unhappily distorted by such either/or characterizations.[7] Moreover, dichotomies curtail further refinement; once you learn that a variable is not present in a given instance, there is little more that can be said.[8]

Law does not appear to satisfy any of these requirements. To begin with, the meaning of law is highly problematic. Although all definitions are stipulative, agreement upon a definition of law has been unusually difficult to achieve.[9] Weber has stressed the absence of sharp boundaries around what should be called "legal" within the domain of substantive rules:

> Law, convention, and usage belong to the same continuum with imperceptible transitions leading from one to the other.... It is entirely a question of terminology and convenience at which point of this continuum one shall assume the existence of the subjective conception of a "legal obligation" (1954:20).

Bohannan (1968a) makes the point more generally: Law in all its manifestations is a noetic concept, whose content must depend on *our* purposes (*see also* Jack Gibbs, 1968). Because law is intimately connected with systems of ethical belief and political ideology, definitional controversies are frequent, lengthy and heated.[10] Each proponent is often unaware of his values, or of the way in which they color his strategy; as a result, the argument soon becomes circular and impossible of resolution.

A further pitfall accompanies the choice of law as a concept. A recurrent word in everyday usage, it carries a substantial cargo of cultural connotation; *i.e.*, it is a folk rather than an analytic concept.[11] If this folk meaning is unconsciously adopted, "law" acquires abundant content, and thus a shared meaning, but only at the cost of warping the analysis by the introduction of a serious ethnocentric bias.

Radcliffe-Brown's extremely influential conception of law[12] exemplifies this last danger of adopting untested the assumptions of one's own culture. Borrowed mediately from Pound (1942), it may be traced to legal positivism and in particular to John Austin's perceptions of, or prescriptions for, English government in the nineteenth century (1954). Law is "social control through the systematic application of the force of politically organized society" (Radcliffe-Brown, 1933a). When Radcliffe-Brown applied this definition outside the western context, he was forced to conclude: "in this sense, some simple societies have no law" (*Ibid.*). He did not question whether it was valuable to continue to use the word "in this sense"; on the contrary, he argued that such usage was "more convenient for purposes of sociological analysis and classification" (*Ibid.*). His pupil, Evans-Pritchard, utilized this conceptual framework in his fieldwork on the Nuer of the Sudan; predictably, he reached the same judgment in almost the same words.

> In a strict sense the Nuer have no law. There are conventional compensations for damage, adultery, loss of limb and so forth, but there is no authority with power to adjudicate on such matters or to enforce a verdict (1940a: 162).

Although "conventional compensations" might satisfy the "systematic" or orderly element of a legal system, they still could not be dignified as law because they were not backed by "the

force of politically organized society," here understood to mean "the power to adjudicate on such matters or to enforce a verdict."

The mistake of both anthropologists was to employ a concept derived from a parochial system of jurisprudence, which had been designed for description and understanding within a particular institutional framework. Used elsewhere, it rendered a verdict of "no law." Because the concept revealed only dissimilarities between domestic and exotic phenomena it oversimplified comparison. However, this lack of fit between definition and data led Evans-Pritchard to expand his concept in order to recognize the modes of social control and conflict resolution he had discovered.[13] Shortly thereafter he published an article in which he acknowledged the existence of law among the Nuer: "within a tribe there is law: there is machinery for settling disputes and a moral obligation to conclude them sooner or later" (1940b: 278).[14] He perceived that legal institutions were not restricted to adjudicative bodies, and that they did not have to enforce a verdict as long as the dispute was ultimately settled. Legal authority could derive from moral obligation as well as from "the force of politically organized society." Together these efforts at conceptual refinement provide us with a number of less general concepts and variables which have proved central to our understanding of legal systems: the processes of social control and dispute settlement; the orderly quality of all social life, to which convention contributes as much as coercion; the contrast between political force and a sense of moral obligation, between adjudication and other methods of decision; and the importance of finality, whether achieved through a verdict or by more flexible procedures. The value of such refinements may be seen in the sophistication with which subsequent investigators, familiar with Nuer ethnography and Evans-Pritchard's interpretations, have been able to discern and investigate legal phenomena where Radcliffe-Brown would have found none.[15]

If ethnocentrism commonly leads the investigator to construct a concept in the image of his own folk legal system, he may occasionally adopt the perspective of the society he studies instead.[16] Malinowski strenuously criticized the error of "defining the forces of law in terms of central authority, courts, and constables . . ." (1926: 14). For he perceived that Trobriand

Islands society was orderly even though those forces were lacking. To account for this orderliness, he offered a "minimal definition" of law (*Ibid.*)[17] which was intended to be universally applicable.

> There must be *in all societies* a class of rules too practical to be backed up by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to the individuals to be enforced by any abstract agency. This is the domain of legal rules, and I venture to foretell that reciprocity, systematic incidence, publicity and ambition will be found to be the main factors in the binding machinery of primitive law (*Id.* at 67-68; emphasis added).

But in maintaining that the law of "all societies" is characterized by "reciprocity, systematic incidence, publicity and ambition," Malinowski was committing exactly the same anthropological sin as Radcliffe-Brown.[18] For a concept modelled wholly upon Trobriand ethnography overlooks many significant phenomena commonly categorized as legal in other societies — for instance, that vast body of rules relating to torts in Anglo-American common law, which are not obeyed out of ambition nor primarily maintained by the forces of reciprocity or publicity.[19] In fact, M.M. Green, one of the few anthropologists who adopted Malinowski's concept, was soon persuaded to add the ingredient of sanction so vehemently rejected by her mentor (1947: Ch. 4-7).[20] Nevertheless, Malinowski's efforts, like those of his fellow controversialists, add to our armory of concepts the positive sanction of reciprocity, rendered potent by the force of personal ambition and reinforced by the glare of publicity.

The conclusion to be drawn from these two landmarks in the history of anthropological inquiry appears to me irresistible. Folk concepts of law possess a meaning, but one tainted with ethnocentrism. When applied to divergent societies they blind the investigator to significant phenomena. Moreover, since the concept is often dichotomous — something either is law or it is not — a negative characterization frequently discourages further inquiry. An analytic concept which avoids the contamination of any folk system (if that is possible) can of course be given content at the whim of its creator, but he is not likely to persuade others of its utility. The results are endless wrangling, of which the Gluckman-Bohannan controversy is a con-

temporary example,[21] and continuing preoccupation with the definition of concepts to the hindrance of more fruitful endeavors. For the time being, at least, it seems clear that we must displace law from the center of our conceptual focus as we attempt to build social theory. Gluckman himself has urged as much (1965b: 18-26).[22]

B. An Alternative Conceptual Focus: Dispute

Some narrowing of vision must therefore be accepted, even if any less inclusive perspective will necessarily be incomplete. I have chosen to concentrate on disputes. I believe I can give that category of phenomena a content which is both unambiguous and generally acceptable, and I shall try to do so below. When so constructed, the concept can be applied more widely across disparate societies than any of the definitions of law already discussed, and will thus help to avoid that dead-end analysis in which the object of our concern has been defined out of existence. Finally, disputes lend themselves to description in terms of variables with continuous rather than dichotomous values.

Lest there be any confusion, let me disclaim explicitly any suggestion that the concept of dispute is an equivalent for, or coterminous with, law. On the contrary, there are numerous other behavioral patterns which we denominate as legal and which are equally worthy of study: social control, the articulation and change of norms, social engineering, administration, etc. Recognizing this, I have deliberately sought to abstract from the totality of legal phenomena a coherent subcategory.

In choosing disputes rather than one of the alternative perspectives toward law, I am merely following others along an established path of inquiry. It is worthwhile speculating briefly on the origins of this preference, as a matter of the sociology of knowledge,[23] for social scientific interest in law has been so largely an interest in disputes. Intellectual milieu has certainly exerted a strong influence. Every new discipline desires to carve out a proprietary niche for itself; the comparative social theory of law is clearly in just this position. If, provisionally, we demarcate its boundaries as encompassing the formulation of norms, the application of those norms, and the behavior to which they apply, then two of those three categories have already been partly occupied by established social science. Politi-

cal science studies the legislative process (and now also the judicial process) by which norms are articulated and changed. The behavior to which those norms speak is largely the province of economics, sociology, and psychology; furthermore, those disciplines have generally discarded legal norms as of little relevance in explaining behavior.[24] But in the routine operations of the courtroom or administrative agency, where norms are applied, legal scholarship has held unchallenged sway, at least until recently.[25] At first sight, this is peculiar. Legal realism, which has furnished American legal scholarship with its prevailing perspective for more than half a century, has repeatedly proclaimed that the key to law lies in its application, that such application cannot adequately be explained by legal norms alone, and that social science offers a fuller understanding of the process of application.[26] Yet lawyers have been extremely ambivalent toward social scientists who actually offer competing explanations for legal decision-making.[27] Political scientists — the first to enter this hitherto exclusive domain with their theories of behavioral jurisprudence — were immediately criticized and subsequently ignored (Becker, 1963; Stone, 1966: 687-95). Fortunately, anthropologists and sociologists appear undaunted by the threat of a similar rebuff; but the cordiality of their ultimate reception by legal scholars is still in doubt.

Social milieu has also been important. Most research on non-Western legal systems has been conducted within the confines of a colonial regime, and therefore to some degree under its aegis. Where, as in the British and Dutch empires,[28] colonial policy was one of indirect rule, administrators required a thorough understanding of indigenous institutions and processes, especially those that dealt with disputes.[29] On the basis of the information acquired, colonial authorities proceeded to "recognize" these indigenous institutions, inevitably transforming them — a process which was accelerated by the intensified demands for modernization which anticipated and followed independence. Western scholars frequently exhibited a romantic nostalgia toward the institutions they had studied and now saw changing. Tribal institutions for handling disputes seemed to them qualitatively different from contemporary western institutions. Many scholars, most conspicuously the anthropologists, shared a negative ethnocentrism which valued tribal institutions above their

western counterparts.[30] Because those institutions were now seriously threatened, the study of disputes became a matter of urgency[31] and real social consequence.

1. Definitions of concepts for analyzing disputes. My purpose is to understand the great variety of ways in which disputes are handled within every society and across different societies. I must therefore construct what Malinowski calls a minimal definition (1926: 14), a concept that will, as far as possible, incorporate all empirical instances of disputing, and also permit the differences between those instances to be described in terms of continuous variables. I start from the perception that a dispute is nothing more than a form of social relationship, a developmental stage through which any relationship may pass. As such, it has certain chronological antecedents. In order to engage in a dispute relationship, the participants[32] must first make physical contact with each other, and that contact must lead to significant *interaction*. Such interaction must contain an element of conflict — the parties must develop inconsistent claims to a resource.[33] Disagreement about a matter of fact (for example, the name of the seventeenth president of the United States) is not conflict; it might become conflict if the participants desired not only factual vindication but also an admission of intellectual superiority. As the illustration suggests, intangibles like reputation can also be the subject of a dispute. Denial of another's claim creates conflict just as effectively as the existence of a counterclaim. By characterizing conflict as a common developmental stage in any relationship, I seek to emphasize that it is not an instance of deviance.

Conflict may develop into a *dispute* if the inconsistent claims are asserted publically, *i.e.*, if the claims, and their incompatibility, are communicated to someone.[34] When a claim is voiced, it is commonly justfiied in terms of a norm — the party or his spokesman argue that the claim ought to be satisfied. The extent to which this normative justification is explicit or implicit, of central importance or merely incidental, will obviously vary greatly. It may be useful to distinguish two variants of dispute. In the first, one party asserts his claim directly to his opponent; I will call this an argument or quarrel.[35] In the second, both assert their claims to a third person, whom

I shall call the *intervener;* I will use the terms case or controversy for this situation. Obviously, many actual disputes will fall at the edge of either category, or somewhere between them. Although a dispute presupposes conflict, and conflict assumes interaction, the chronological sequence is not otherwise inevitable or irreversible. Contact may not lead to significant interaction (brushing against a fellow passenger on a bus); interaction may not produce conflict (one party to the above interchange immediately apologizes); and conflict may never ripen into dispute (the injured party still harbors a silent grievance, but departs at the next stop). Moreover, the developmental sequence may be reversed: a dispute may subside into conflict if one of the parties ceases to assert his claim publically; conflict may disappear from interaction if he ceases to believe he has such a claim;[36] significant interaction may subside into mere physical contact, and contact itself may cease. Because these social relationships are extremely fluid, I will refer to the situation in which the disputants find themselves at any given point in time as the outcome.[37] When I wish to emphasize greater finality I will use "decision", a term which suggests both a choice between alternatives and a resting place in the dispute, if one which may be no more than transitory. A decision need not be the unilateral utterance of a third person; it can also result from agreement between the parties. I have deliberately avoided the more common phraseology "dispute settlement" and "conflict resolution."[38] Anthropologists and sociologists have tended to write as though "settlement" must be the ultimate outcome of disputes, "resolution" the inevitable fate of conflict.[39] The prevalence of this perspective may be due to the assumption of functional anthropology, and structural functional sociology, that every society tends toward an equilibrium state.[40] Or it may simply be another instance of the romantic idealization of tribal societies.[41] But it has recently become almost commonplace to observe that the outcome of most conflicts and disputes are other conflicts and disputes, with at most a temporary respite between them (*see, e.g.,* MacGaffey, 1970; Burridge, 1957; Berndt, 1962; Kopytoff, 1961; Tanner, 1970; Collier, 1973).

The definitions offered above mark the boundaries of the phenomena I wish to study. Although my notion of dispute

bears considerable resemblance to the judicial process — indeed, precisely because of this superficial similarity — it is worth emphasizing that the two are in no way equivalent. The vast majority of disputes in any society never enter its judicial institutions, however broadly the latter may be conceived. And a significant proportion of the business with which most judicial institutions are concerned does not involve disputes at all but rather the routine administrative processing of uncontested divorces, wage attachments, evictions, default judgments, bankruptcies, and many criminal misdemeanors.[42] A social theory of disputes is thus both more and less than a social theory of law.[43]

In order to develop that theory we need additional concepts to analyze the phenomenon we have now circumscribed. The number of paths a dispute could conceivably follow is, of course, very large. Even within a given society, the number of paths actually taken may be substantial. Nevertheless, in every society most of the disputes will fall into a relatively limited number of patterns. We speak of these recurrent patterns for disputing as being *institutionalized* (Nadel, 1951: Ch. 6). What this means, at a minimum, is that the participants occupy *roles* within the institution which handles the dispute.[44] These roles define the relationships among all of the participants in the dispute, and between each participant and the outside world; I call this role set the *structure* of the dispute or dispute institution. The definition of roles within the dispute affects the way in which incumbents of those roles perform; I call their behavior the *process* of the dispute or institution. Although we can usefully talk of structure as having some chronological, even causal, priority over process, or view process as action which occurs within a structural environment, these concepts are obviously relative, and their interaction is reciprocal. Finally, the extent to which a dispute pattern is institutionalized is itself a variable: litigation in official courts is highly institutionalized, marital squabbles are not;[45] yet both, to some degree, possess a recurrent structure and display patterned behavior.

2. Parameters of the dispute process. By stripping the concept of dispute, as far as possible, of those elements peculiar to a particular instance, I simply postponed the job of charting the ways in which actual disputes differ. I will now turn to

that task and try to identify significant parameters by which we might measure variation in the processual dimensions of disputes, selecting from previous analyses.[46]

Let me stress that this exercise is intended to illustrate the feasibility of an approach, not to survey the literature exhaustively. The processual variables may conveniently be charted by tracing the sequence of events in a paradigmatic dispute; of course, no particular element is essential, nor is their order foreordained.

Before a dispute can arise, an individual must claim a resource to which another asserts an inconsistent claim.[47] Societal definitions of resource and scarcity obviously will affect the nature and frequency of such conflict.[48] Its occurrence is also governed by psychological factors: individuals in a society may react to a threat of conflict by repressing their desires.[49] Even if a person is himself conscious of conflict he may decline to publicize it, for all societies offer alternatives (Hirschman, 1970): migration to avoid further discord,[50] postponement of a grudge for a more opportune time (P. Spencer, 1965: Ch. 7), and resignation, perhaps in the hope of vindication in an afterlife.[51]

If the individual does assert his claim, conflict becomes dispute. There will be variation in the way this occurs: which claimant makes the assertion,[52] whether he does so personally or through a representative,[53] and to whom he does so, especially in which forum or fora.[54] Once initiated, the breadth of the dispute must then be defined along three dimensions: the number and scope of grievances raised, the number and identity of parties involved, and the historical depth in which the controversy will be explored. Fallers has noted that a "case" is a culturally variable unit, and has contrasted processes which only inquire into the violation of "a particular rule" with others which plumb "the full moral complexity of conflict situations" (1969: 11-12; *see also* A. L. Epstein, 1967b: 230). Nader, independently and contemporaneously, offered a parallel distinction between situations where "the cause of the dispute is already known and proceedings function to settle" and others where a "variety of disputes is discussed to mediate the basis of the dispute" (1969c: 87).[55] Grievances may ramify not only between the nominal parties to the dispute, but also among

others, and among all disputants across time. At one extreme is the dispute which only involves the "contending parties" (Cohn, 1967: 156), "total strangers" (Fallers, 1969: 13) whose relationship is limited to the transient encounter, frequently contractual, which generated this dispute. At the other is the controversy between parties linked by a "substantial period of association . . . in the course of which each has done things to the other of which he ought to be ashamed" (Fallers, 1969: 12); where disputants are enmeshed in multiplex relations "it is the wider social networks that influence a decision" (Nader, 1969c: 88; *cf.* Kawashima, 1963); "the case which is the crux of the dispute is only a minor expression of a long-standing antagonistic relationship between two families or groups" (Cohn, 1967: 156).[56]

The definition of issues interacts with the nature of the factual investigation. Aubert has sketched two divergent paths which this inquiry may follow (1963b). If those engaged in the dispute are motivated by considerations of utility, they will be concerned with historical fact only so far as it assists them in forecasting the consequences of alternative accommodations. These predictions are, of course, subject to verification, and will be revised if shown to be incorrect: the dispute will extend temporally into the future rather than the past. Subjective facts become crucial — the present emotional set of the disputants — and suitable means for ascertaining them will be adopted: the therapeutic relationship exemplifies this approach. Alternatively, the participants in the dispute may seek to apportion praise and blame, and must then ascertain historical fact in detail.[57] This option brings into prominence the procedures for factual determination: who presents evidence and how, what evidence is acceptable or necessary, how the evidence is assessed and by whom, and what is done if the evidence is lacking. Such an interpretation of history is not subject to modification in the light of subsequent events.

While the above observations by sociologists and anthropologists are relatively novel, legal philosophy has long reflected upon the characteristics of norms and the way they are employed in disputes. Pound asserted: "Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion . . ." (1922: 70). This distinction has been refined

to recognize the clarity and discreteness of rules when contrasted with vague, overlapping standards (*see* Fallers, 1969: 11; Yngvesson, n.d.; Eckhoff, 1969: 176; Dworkin, 1967: 25 ff.). Application of the norms may focus upon the general, repetitive patterns of conflict situations, or the idiosyncratic features of the dispute (Pound, 1922: 70). The underlying thought processes have been described as falling along a continuum between the rational and the irrational (Weber, 1954: 63-64), or between intelligence and intuition (Pound, 1922: 70, following Bergson). The process may be charactrized by formal orderliness, expressed in adherence to a code or doctrine of precedent and achieved by means of legal conceptual reasoning; or it may subserve substantive ends and result in a series of *themistes,* disjoined from both past and future decisions (Maine, 1950: Ch. 1; *see also* Weber, 1954: Ch. 4). Norms may be advanced by a party in support of an argument, or by a third person urging a particular outcome; these arguments may be more or less explicit.[58]

Disputes differ in the outcome toward which they tend: some simmer indefinitely without firm resolution; others generate considerable pressure for a decision of any kind.[59] This may be a clear, simple, dichotomous decree favoring one party to the excusion of the other; or it may be an ambiguous compromise which considers "all the rights and wrongs of this situation" (Fallers, 1969: 13), and awards to each party some of what he seeks while denying other elements of his claim.[60] The outcome may be imposed unilaterally upon the parties, or an effort, greater or less, may be made to secure their assent by a variety of means (Fallers, 1969: 11; Aubert, 1963a). The remedy may be expressed in sanctions which are repressive or restitutive, positive or negative, diffuse or organized (Durkheim, 1947; Radcliffe-Brown, 1933b). The judgment may be announced as final, or finality may consciously be avoided (Cohn, 1967: 156); in either case there may be further opportunities for review or reinterpretation. And there will, of course, be variations in the manner in which subsequent behavior is affected by the decision.[61]

3. Are there two types of dispute, legal and political? In this brief survey of variations in the dispute process, I viewed the role that norms may play as simply another parameter, similar in nature to all the others. Some social scientists have

argued that this factor divides disputes into two groups, fundamentally different in kind, which require distinct conceptual frameworks for analysis. Fallers contrasts the adjudication of rule violations with what he calls "political" disputes, "conflicts of *interest*" arising out of the pursuit of inconsistent policy goals; since in such controversies the choice of decisional rules is itself the issue, resolution cannot be governed by rules (Fallers, 1969: 12, italics in original; *see also* Aubert, 1963a). Gulliver has carried the analysis further, and conceptualized "two polar types of process — judicial and political — between which there is a graduated scale . . . ."

> By a judicial process I mean one that involves a judge who is vested with both authority and responsibility to make a judgment, in accordance with established norms, which is enforceable as the settlement of a dispute. . . .
> The purely political process, on the other hand, involves no intervention by a third party, a judge. Here a decision is reached and a settlement made as a result of the relative strengths of the two parties to the dispute as they are shown and tested in social action. The stronger gains the power to impose its own decisions, but it is limited by the degree to which its opponent, though weaker, can influence it. In this case the accepted norms of behavior relevant to the matter in dispute are but one element involved, and possibly an unimportant one (1963: 297-98).

Gulliver developed this typology in an attempt to portray dispute settlement among the Arusha of Tanzania. He has since modified his position somewhat in order "to avoid the establishment of precise ideal types or models" and to emphasize that "there is no absolute dividing line between the two modes" (1969a: 22-23). But his revised formulation, while thus qualified, is not fundamentally changed.

> Essentially the difference is between judgment by an authorized third party, on the one hand, and negotiated agreement without judgment, on the other; that is, the difference between the presence or absence of overriding authority. . . .
> From this I would suggest the hypothesis that, on the whole, there is greater reliance on, appeal to and operation of rules, standards, and norms where adjudication rather than negotiation is the mode of dispute settlement (1969a: 17-18).

Indeed, he found substantial confirmation of the schema in subsequent fieldwork among the Ndendeuli, another Tanzania tribe which lacks even those institutionalized notables who in Arushaland are available to mediate, though not to decide, disputes.

> Obviously in a moot Ndendeuli attempt to enunciate these expectations [concerning reasonable role performance], and they seek to measure a man's conduct against them. On the other hand, not only are the expectations rather indeterminate . . . but there is also no third party, no adjudicator, and no technique to determine specifically the acceptable, operative, reasonable expectations in the vent of a particular dispute. And while men seek their own advantages and attempt to avoid what is disadvantageous, the process of settlement must depend also on other considerations not directly related to the merits of the matter in dispute: the strength with which a defendant can resist his claim, the degree to which a plaintiff can be persuaded to reduce his claim, the degree and kind of support each can obtain from other involved persons. (1969b: 66).

Where Fallers and Gulliver concentrate upon defining the political process, Pospisil arrives at a similar view by identifying the other pole of the dichotomy, the judicial, with an attribute which he calls "the intention of universal application . . . the authority in making a decision intends it to be applied to all similar or 'identical' situations in the future" (1958: 262; *see also* Kawashima, 1963).

This typology is certainly not unfamiliar to lawyers. The judicial models described above clearly fulfill the lawyer's ideal of the rule of law. Lon Fuller has argued that adjudication, as an ideal type, is a process in which the parties present, and the judge is guided by, evidence and reasoned argument (n.d.: 29). And Herbert Wechsler, in advocating "neutral principles" as the only appropriate basis for judicial decision, employs a similar standard:

> A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved (1961: 27-28).[62]

If these models share a common core it would seem to lie in the contrast between disputes which are governed by norms — especially those characterized as established, universal, general, or neutral — and controversies dominated by non-normative factors, such as "policy goals," the "immediate result," or the "relative strength" of a party calculated in terms of social support. It is no accident that lawyers and social scientists, starting from their very different perspectives, have converged upon the same distinction.[63] For the dichotomization of

disputes into two exclusive categories is not merely an analytic device; it is the necessary, and sufficient, assumption from which legal scholarship and social science can divide up the phenomena to be understood in such a way that each discipline reigns unchallenged in its own domain. If disputes are of two different kinds, they require distinct modes of understanding. The category of disputes governed by norms is obviously the domain of lawyers, who have elaborated highly sophisticated techniques for explaining those disputes in terms of the norms involved — the official substantive and procedural rules. Lawyers may differ as to the best mode of ascertaining the norms, and thus argue about what the norms really are, but they are agreed that any other explanation is impermissible.[64] Within the category of political disputes, on the other hand, norms are by definition of little relevance, and certainly cannot be a sufficient explanation for the behavioral patterns observed. Here lawyers gladly abdicate in favor of social scientists who can offer an explanation in terms of social factors other than norms. The distinction thus has profound consequences for scholarship.[65] Yet it seems to me to rest upon a fundamental fuzziness concerning what it means for a dispute to be "governed by norms." Let me consider the meanings suggested by the above quotations.[66]

(1) The disputants or other participants *think* they are acting in accordance with norms in urging a particular outcome. This appears to be Pospisil's usage when he speaks of an authority intending universal application. I do not believe that this is a fruitful sociological approach. The authority's intention at the time of deciding is singularly difficult, if not impossible, to ascertain, and Pospisil indicates no way of doing so.

(2) The participants in the dispute *invoke* norms in advancing a solution to the dispute. Fuller suggests this aspect in his emphasis on reasoned argument (n.d.: 20). As heirs of the legal realists we are not likely to confuse the invocation of norms with their actual influence. But if normative language is no guarantee that norms govern, can we draw from their absence an inference that they are irrelevant? A number of writers, most recently Fallers, have observed that norms may play a major role in disputes without ever being mentioned explicitly by judge or litigant (1969: 320 ff.). Hence invocation

as an index does not serve to create two categories of disputes, normative and normless.

(3) Norms *determine* the outcome of the dispute. Dworkin has analyzed this "model of rules" (1967: 36; *see also* Moore, 1970b: 323, 341) in depth, and agrees with, indeed trivializes, the insight of the legal realists that it is the rare norm which can or does dictate a decision,[67] and that much of the decision-making in many disputes falls beyond the purview of existing rules. From this standpoint very few of the cases tried by official courts are legal disputes. Are we to conclude that norms play no part in the remaining controversies? Emphatically not. A norm of a different kind, which Dworkin refers to as a standard, principle, or policy, "states a reason that argues in one direction. . . . [It] is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another" when we reach or surpass the penumbra of rules, or when they require change (1967: 26). Nevertheless, the applicability and relative weight of these standards are always to some degree uncertain, with the result that a full understanding of the course of a dispute can only be gained by looking, as well, at factors extrinsic to its normative content. Hence Fallers cannot readily discriminate on this basis between political disputes and lawsuits, and once again the simple dichotomy breaks down.

(4) If only a few rules unambiguously dictate a unique judgment, still the judicial process for dealing with disputes can be distinguished from other such processes by the fact that all the norms it employs possess the characteristic of neutrality. This proposition is obviously subject to the line of attack just outlined; indeed, it is particularly vulnerable since the very neutrality on which Wechsler insists increases the indeterminacy of outcome.[68] But, more importantly, the criterion of neutrality does not divide decisions into principled and unprincipled, for the degree of generality required of a norm is arbitrary and never adequately specified.[69]

It is not necessary to be entirely satisfied with this discussion of the troublesome issue of rule and discretion in order to respond to the problem which stimulated my excursus: In charting regularities in the dispute process is norm a variable that is necessary and sufficient to describe one category of dis-

putes, while wholly irrelevant to the other? The first half of this question has been adequately answered in the negative if, indeed, it is not the straw man which Dworkin asserts it to be (1967: 16).[70] The other alternative can be disposed of more quickly. Is there a significant category of disputes at the "political" end of the spectrum, in which norms play no role whatsoever? It is difficult to imagine the assertion of a claim without an appeal, if only implicit, to some general societal evaluation of human conduct.[71] Gulliver, alone, has offered ethnographic evidence of disputes without normative content, and he has since disavowed that interpretation (1969a: 12; 1969b: 66 n.12).[72] It would seem sensible, therefore, to pursue our analysis in the expectation that norms will play *some* part in most disputes we encounter (Moore, 1970b: 330).

From that perspective, it may prove valuable to return to the distinctions just criticized for hints as to the ways in which norms may be involved in a dispute. Dworkin (1967: 25-29) demarcates rules from standards on the basis of two criteria: 1) rules either dictate a decision or are irrelevant; standards may argue for a decision without necessitating it; 2) standards have weight relative to one another; rules do not.[73] I do not think this dichotomy can be maintained either; most norms will function more like rules at one time, and more like standards at another.[74] But I believe the variables Dworkin employs in drawing his distinction are potentially useful: the degree of clarity with which a norm includes a fact situation, and points to an outcome, and the weight of the norm in competition with others. Similarly, while Wechsler fails to convince me that certain principles are neutral in any absolute sense, the generality of a norm may be an important variable.[75] And Fuller is certainly correct that the extent to which normative arguments are voiced and responded to by a judge, should also interest us (n.d.).[76] Other variables which overlap somewhat with those just discussed might be: the degree to which the norms are consistent or inconsistent,[77] vaguely or clearly defined (Gulliver, 1969a: 18-19), fixed or flexible,[78] and how far the universe of norms is open or closed.[79]

The dichotomy we have just rejected, however, borrows additional weight from a structural argument: although a dispute may well involve norms, they will only influence the

outcome if it is determined by an authoritative third-party adjudicator. Gulliver makes this equation explicit (1963: 297-98) but even others like Aubert (quoted in Nader, 1969c: 87) Pospisil (1958: 258 ff.), who identify the authority of the adjudicator as an independent variable, associate that factor with normative decision-making. Perhaps this conjunction is suggested by our everyday experience; certainly popular mythology attributes evenhandedness to the judge and selfishness to the parties. But for purposes of analysis these variables must be kept distinct. They belong to different orders of conceptualization: the way in which norms enter into a dispute is a processual variable; the presence of an authoritative third-party is a structural element.[80] Their correlation must therefore be made problematic.

If it is, the proposed hypothesis fails, both theoretically and empirically. Authoritative third-party decision-making is not necessary for norms to play a significant role in a dispute. Such a proposition would imply that the only possible source for the influence of norms upon disputants is the authority of a judge. But clearly there are other sources. One of the disputants may possess an authority to declare norms similar to that of the judge — think of quarrels between parents and children (Piaget, 1965: 107).[81] And quite apart from who *announces* them in the course of a dispute, the norms may themselves be endowed with legitimacy derived from tradition,[82] or created by mutual agreement, as where the players in a game follow the rules because of their desire to keep playing.[83]

Neither is the presence of an authoritative adjudicator a sufficient condition for the dominance of norms.[84] Just as the participants may adhere to norms for reasons other than the authority of the judge, so the judge is subjected to influences which are not exclusively normative. As Gulliver has now realized, the degree of insulation from such pressures is a continuum along which the judicial process is only marginally more sheltered than the political (1969a: 22). A striking instance of a dispute process constantly accommodating to relative power is the Lebanese *wasta* maker, described by Laura Nader (1965c; *see also* Hitchcock, 1960). An African example, however, may be more appropriate in the present context. J. A. Barnes has described disputes among the Ngoni, a Central African tribe

endowed with a traditional hierarchy of authoritative courts, some of which were absorbed into the colonial legal system of Northern Rhodesia in 1929 and given enhanced powers and more formalized procedures.

> Despite this measure of legal assimilation, the present actions of Ngoni Native Courts can be understood only in terms of their historical roots in Ngoni society prior to 1929, and of the contemporary political scene, as well as in terms of the British legal system. The county chief who presides in the Native Court is the political leader of his people and his actions as a judge are coloured by his political position. The Ngoni Paramount Chief is political head of the tribe, and in addition presides over the Ngoni court of appeal. There is then no clear separation of the courts from politics.... The Native Court is used to implement the policy of the Native Authority. A chief anxious to gain favour with the British Administration sees that his court enforces with substantial penalties the various regulations in which the Administration is interested for the time being. A chief who wishes to obstruct the Administration will neglect these regulations in his court....
>
> In the court the magnitude of the penalties imposed or damages awarded is influenced by political considerations, among others. Ngoni society is not egalitarian, and status differences are reflected in differences in penalties... Political considerations of the moment show themselves when a chief or other court member obstructs a suit brought by a litigant he dislikes... Missionaries endeavour to persuade chiefs not to grant divorces to their converts; Indian traders endeavour to get their disputes with Africans heard in Native Courts rather than in those of the Administration, as is required by the Ordinance on Native Courts; white farmers instruct Native Courts to deal promptly with cases involving their labourers (1961: 179-82).

Barnes concludes: "The legal system is not a kind of calculating machine, with an input of wrongs and an output of rights. It is part of the social process in which groups and individuals strive against one another and with one another for a variety of ends" (1961: 193).[85]

It should not be thought that only in the non-western world is the dispute process dissociated from its normative guidelines. It is now widely recognized that significant behavior occurring within our own institutions for handling disputes is only partly guided by official norms. We may distinguish three situations. Some instances of deviation are officially recognized and approved: the institution of the jury is the most prominent example;[86] the disposition of offenders is another.[87] Other forms are tolerated with greater ambivalence. Norms alone do not

govern the decision by private individuals, or by the government, to assert a claim,[88] or to choose a particular forum, despite the occasional protestations of prosecutors that they pursue every infraction.[89] If the disputants avoid a court — and the vast majority do — there may be little pretense of adhering to the judicial model. Even if they initiate legal proceedings, the definition of the claim and its later modification during pre-trial negotiation or plea bargaining may not be explicable in terms of the norms officially proclaimed; and many disputants reach an agreement at this stage with the acquiescence, indeed encouragement, of the court.[90] The outcome of the dispute process is itself a complex product of both normative and non-normative factors, a product we have recently been helped to understand by the investigations of political scientists into judicial background and ideology.[91] Finally, some factors continue to intrude in spite of the efforts to extirpate them or deny their presence,[92] *e.g.*, corruption,[93] and inequalities among disputants.[94]

The section now concluded is offered as a justification for treating the significance of official norms within the dispute process as a variable, or rather a number of variables. This is a decision of no mean importance, for on it rests the possibility of a social theory of law distinct from legal theory or jurisprudence (*cf.* Aubert, 1969a: 10). In attempting to construct social theories about disputes I wish to emphasize that I am not dismissing legal theory as either superfluous or superficial, nor am I arguing for some form of sociological reductionism.[95] As I have tried to show above, the apparent contradiction between the two approaches is an outgrowth of ideologically biased misunderstanding of the actual course of disputes. If legal scholars persist in maintaining that they provide a complete explanation of "legal" disputes when they explicate the official norms involved, then any attempt by social scientists to offer another explanation will be seen as threatening and illegitimate.[96] It follows that the only possible accommodation between them is the recognition of a category of non-legal disputes. But the two disciplines can cooperate far more fruitfully if they will agree that norms are a significant factor affecting the course of disputes but rarely, if ever, the exclusive one. By no means do I wish to minimize the importance

of the universe of norms: it may quickly foreclose the outcome of many disputes, and define the boundaries of what can be argued in others. Yet in all disputes there is a great deal of behavior which norms do not explain[17] — areas where the norms do not speak, where they are sufficiently flexible or inconsistent to allow freedom of action, or where they are overridden by more powerful forces. Only a composite of norms and other social factors can adequately portray the complexity of behavior in disputes.

III. THE FORM OF SOCIAL THEORY OF LAW

A. Construction of Ideal Types

Social science has long been discontent to stop at the mere description of variety, classifying phenomena according to some arbitrarily selected common trait (*see, e.g.*, Nader, 1969c: 99; Leach, 1961: 3; Southall, 1965). One means of advancing our understanding beyond this point is the construction of an ideal type, which Weber has defined as:

> the one-sided *accentuation* of one or more points of view and ... the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete *individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytic construct (1968: 497; *see generally* Schweitzer, 1970).

I have already adverted to several ideal types of dispute: the dichotomy of legal and political was explicitly stated in this form, but most of the other processual variables identified above were also extracted from a typological construct. Thus we find repeated references in the literature to oppositions such as: mediator and adjudicator (Eckhoff, 1969; *see also* Aubert, quoted in Nader, 1969c: 87); legal and scientific decision-making (Aubert, 1963b); repressive and restitutive law (Durkheim, 1947); adjudication, negotiation and election (Fuller, n.d.); ancient (Maine, 1950), or primitive (Radcliffe-Brown, 1933a; *see also* Redfield, 1964; Diamond, 1971, and earlier writings cited therein), or tribal (Gluckman, 1965a, 1965b; *see also* Schapera, 1956; Carlston, 1968), or African (Allott, 1960; *see also* Elias, 1956; Driberg, 1934), or Indian (Cohn, 1967; *see also* Galanter, 1963), or Japanese law (Kawashima, 1963) on the one hand — and modern, or western, or Anglo-American law on the other. And of course Weber himself developed a typology of

justice which is frequently imitated (1954: Ch. 4). Several factors may explain this predilection for ideal-typical thinking: residual ethnocentrism, a predominately pragmatic or ethical concern conjoined with theoretical immaturity, or the unavailability of data which would be required to test hypotheses.

Nevertheless, it is necessary to ask whether this approach is the best means of proceeding at the present time. The anwer, as always, depends upon where we want to go. Weber argues:

> This procedure can be indispensable for heuristic as well as expository purposes. The ideal typical concept will help to develop our skill in imputation in research: it is no "hypothesis" but it offers guidance to the construction of hypotheses. It is not a *description* of reality but it aims to give an unambiguous means of expression to such a description (1968: 497).

We have confirmed this claim by extracting from the ideal types of others a number of significant variables, and possible linkages among them. But this mode of thinking may have serious drawbacks.[98] Weber was able to mobilize a vast number of highly diverse phenomena in constructing his typology; a less erudite theorist may rely upon the few societies of which he has personal experience,[99] or upon inaccurate descriptions more or less randomly chosen from limited reading or experience.[100] The qualities defining the type, being lumped together, are imprecisely specified. Dichotomies are common, almost universal, in sharp contrast to the multiplicity of types which Weber usually offered. The pairs of variables on which they are based may not lie on the same scale, or may fail to represent the extremes of that scale, and certain parameters may possess only a single value. What emerges is not an ideal type but a stereotype which, far from instructing the eye of the observer, blinds him to data not encompassed by the type, and also to the possibility of other types.

Perhaps my criticisms reduce to a fear that we know too little about relationships among the qualities of disputes to begin grouping them in this fashion. Let me use Laura Nader's recent typology to illustrate what, to me, is the arbitrariness of the conjunction; the example is chosen with deliberate unfairness, for hers is surely one of the most fruitful concepts in the literature.[101] Nader finds a style of court procedure among the Zapotec which resembles that of societies otherwise dis-

similar in institutional framework and general political and economic conditions.

> The similarity is principally in the value placed on the minimax principle, rather than on the zero-sum game. From this principle follows a de-emphasis on establishing past fact; a prospectively oriented reasoning; and the use of proceedings as a technique for expression and for finding out what the trouble really is before reaching a settlement, even though this may be . . . an agreement to avoid a decision (1969c: 88).

The elements of this typology may be paraphrased as: 1) minimax vs. zero-sum; 2) prospective reasoning vs. emphasis upon past fact; 3) broad definition of the dispute vs. focus upon narrow, superficial issues; 4) settlement by agreed compromise vs. unilateral decision. Are these two styles so fundamental, and mutually exclusive, that we can usefully classify dispute processes according to whether they resemble one or the other? I think not.[102] No reason is offered by Nader for her assertion that the combination is a significant one, aside from its empirical occurrence in a variety of societies. Yet it is not difficult to cite examples of other disputes which might well adhere to the "Zapotec" style in most respects, but deviate from it in one particular: 1) competitors disputing over some indivisible economic good, for instance a liquor license, would still be engaged in a zero-sum game; 2) a parent intervening in a quarrel between his children might choose to emphasize past behavior and its divergence from norms in order to internalize those norms; 3) a married couple quarreling over a minor irritant will often scrupulously avoid all the deeper issues;[103] 4) a parole board considering whether to release a prisoner certainly renders a unilateral decision.[104] Indeed, it is hard to believe that similar departures from the "Zapotec" style could not be found in the Zapotec courts themselves.[105]

One response to the discovery of such discordant data might be to multiply the number of ideal types.[106] This is clearly a process without end, and would deprive the typology of whatever heuristic value it possessed. An alternative might be to refine the construct; but the typologists offer no criteria by which we might choose among potential ingredients. I prefer to proceed differently and resolve each proposed type into its constituent variables, which can then form the ingredients for a different kind of generalization.[107]

B. Correlation of Variables

Another means of explaining the characteristics of the dispute process is to look for regular conjunctions with other social variables. These will be of the general form "if x, then y," where y, the dependent variable, is the quality of the dispute process to be explained. In order to narrow the independent variables to a number that can realistically be explored,[108] I will again employ the criteria **invoked earlier; meaningfulness, universality, and continuity.**

1. Separability. The selection of one variable imposes upon the other an additional constraint of independence or separability.[109] I have sought to satisfy this requirement by choosing my independent variables from among the structural characteristics of the dispute, as contrasted with the process itself: the **environment** in which the participants act as opposed to what they **do.** This distinction, however, is not as clear as one might like. True, extreme examples present no problem: the seating arrangement of participants discussing a dispute seems clearly structural when counterposed against the breadth of issues ventilated. Within these constraints I will review existing theories about disputes for suggestions of variables that may prove significant, **i.e.,** that may be causally linked to the dispute process. Nevertheless, the labels are relative: the same physical seting might be seen as an event in the dispute process when set against a background of the social relationships which linked participants before the dispute arose; and the issues which are aired could be viewed as a structural dimension of the dispute which helps us to predict the kind of evidence offered. Because of this relativity, the designations become somewhat arbitrary when affixed to contiguous elements in the dispute, where structure and process merge. Are the choice of a forum and the definition of the claim asserted two variables which can meaningfully be correlated, or a single datum measurable in two ways? This is, of course, an empirical question which is not answered by calling one structural and the other processual.

Still, the categories may help us to evaluate alternative strategies for inquiry. As the variables approach each other, correlations between them become more likely, but also more

commonplace; moreover, an asserted correlation may often turn out to be simply the discovery of identity. Choosing variables which are more dissimilar reduces the probability of identifying significant relationships; but any such finding will be less obvious, and thus a more substantial contribution to our knowledge, if also less precise and more subject to exceptions. Because there is no accepted criterion for deciding between these alternatives, I will consider variables falling everywhere along the spectrum from structure to process, trying to make explicit just how separate each structural quality is from the process it purports to explain.

2. Generality. Structure tells us the direction in which to look; the next question, therefore, is what structural elements to investigate. I argued earlier that social inquiry should focus upon disputes rather than law because of the greater universality of the former concept: the possibility of finding a referent in a wide variety of societies. The same consideration leads me to reject a structural unit too closely identified with any actual institutional framework for disputing. Structural concepts modelled upon Western notions of a court inevitably incorporate idiosyncracies which hinder comparison, for exact counterparts can rarely be found in alien societies. Within our own society, indeed, excessive preoccupation with the peculiarities of courts has long diverted legal scholars from the numerous non-judicial institutions which deal with the vast majority of disputes. Nor do the structures of other societies offer any better perspective for comparison; there are just as many obstructive singularities in such institutions as the leopard skin chief of the Nuer (Evans-Pritchard, 1940a: 152 ff.), the *tonowi* (rich one) of the Kapauku Papuans (Pospisil, 1958: 79 ff.), the group of *mbatarev* (lineage elders) of the Tiv (Bohannan, 1957: 11 ff.), the *mkutano* (meeting) of the Ndendeuli (Gulliver, 1971: Ch. 5), or the *kuta* (council) of the Lozi (Gluckman, 1955: 9 ff.). When efforts are made to compare such disparate structures, one or the other is usually distorted (van Velsen, 1969). And the attempt to construct a "neutral" concept at a level of complexity sufficient to account for the heterogeneity of actual institutions inevitably founders on objections of incompleteness and arbitrariness, colloquially phrased as: "with us, we do it differently."[110]

IV. CHOICE OF AN EXPLANATORY CONCEPT: THE ROLE OF THE INTERVENER

A. The Concept of Role

Many of these problems diminish or disappear if, for law, we substitute dispute and consider the structural components of *that* process rather than the social architecture of particular court-like institutions. My definition of a dispute as "the assertion of conflicting claims by two or more individuals" presupposes a minimum of two structural units: a person asserting a claim and another asserting a conflicting claim. These units are conveniently described in terms of the concept of role. Among the numerous definitions which sociologists have assigned to that concept,[11] many agree in conjoining characteristics of the person occupying the role with normative expectations about the behavior in which he will engage (Biddle and Thomas, 1966: 29-30). The role of participant is thus itself a composite of structure and process, nicely expressing the relativity of those two perspectives upon behavior, which I discussed above.

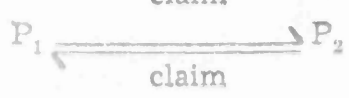
1. Description and prescription. Nevertheless, there are numerous ambiguities latent in the concept of role, two of which I must clarify at the outset. Behavior may be classified in many ways: I will do so in terms of process, and speak of participation in the dispute process. Roles will be further partitioned by function within that process, *e.g.*, asserting a claim, or listening to an assertion. More critical for the present study is the possibility of confusion between description and prescription. The concept of role can refer either to observable characteristics of person or behavior, or to social prescriptions concerning those characteristics. This ambiguity equally afflicts my definition of the dispute process, which may be studied in terms of either the actions of participants or the prescriptions for action. These elements diverge in all societies, but the schism is especially marked in colonial and post-colonial situations for a number of reasons: the radical transformation of behavioral patterns under the impact of changed social, economic and political conditions; the introduction or intensification of normative pluralism resulting from superimposition upon indigenous norms of alternatives promoted by the colonial ad-

ministration, the missionary churches, and the settler population; and the incorporation of some of these alien norms into the legal system. Furthermore, because disputes represent a fundamental problem for social order, and therefore occupy such a central position in all legal systems, they are commonly the subject of extensive, explicit, official prescriptions concerning both structure and process. But although these dual perspectives of description and prescription are frequently noted, interest in their interrelationship has been directed almost exclusively towards ascertaining the conditions under which prescription is followed by action. Thus writers have asked: when is a law effective, and when nullified; what are the prerequisites for the penetration of a legal system, and what defects will relegate that system to mere formalism? (*See, e.g.*, materials contained in Friedman and Macaulay, 1969: Ch. 3.) One reason we have progressed so little beyond the platitudinous observation of ineffectiveness may be our failure to investigate other patterns of rule and act. Prescription which does not produce the result prescribed may yet lead to other actions or prescriptions: rent control legislation passed during a housing shortage is not "ineffective," even though rents continue to rise, if a landlord alters his behavior, a tenant initiates legal action, a judge decides a case differently, or any person invokes the norm proclaimed by the statute (Ball, 1960). Alternatively, the norm may be cited as precedent — good or bad — for an analogous norm, in other attempts to regulate the economy.[112] Action may lead to action (*e.g.*, increasing the salaries of judges may diminish the taking of bribes)[113] or to prescription (*e.g.*, a judge chosen from outside the community he serves may be readier to depart from its norms in passing judgment).[114] Having learned not to expect a one-to-one correlation of these elements, it seems reasonable to look instead for a more complex relationship.[115] In what follows, I will consider the interaction among the *actual structure of disputes, e.g.*, the presence of a third party; *prescriptions about structure, e.g.*, that there should be a separation between administrative and judicial functions; *prescriptions concerning process, e.g.*, that evidence should only be received during the formal hearing of a dispute; and the *actual process, e.g.*, that the intervener in fact brings to bear considerable prior knowledge of the dispute. This should not

lead to misunderstanding if we are careful to specify whether we are discussing description or prescription.[116]

2. The elementary structure of a dispute: the role of disputant. The field of inquiry demarcated by the criteria chosen thus far is still much too large for a single study. I can best explain the additional limitations I have adopted by means of a diagram of the dispute process. The simplest structure, in terms of the number of elements, is one in which each party performs the role of audience for the claims of the other.

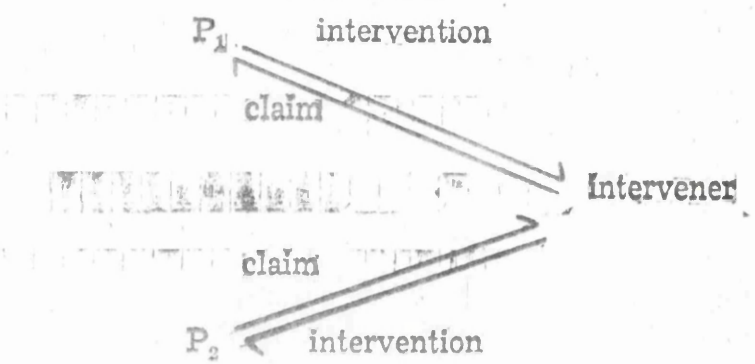
FIGURE 1



Here the investigator is effectively limited to studying the roles of the disputants, and their relation to each other. Even in the presence of a distinct audience these are obviously important facts, and a number of writers have profitably examined them. Gluckman has emphasized the way in which African social structure produces relationships between disputants different in kind from those typical of European societies, and the influence this has upon the dispute process (1965b: 5). Evans-Pritchard, in his classic study of the Nuer, demonstrated that the structural distance between particular disputants significantly affected the evolution of their dispute (1940a: 155; **see also** Colson, 1953; Middleton, 1960; Nadel, 1942: Ch. 10; Winans, 1962: Ch. 6; Gulliver, 1963: Ch. 10; Collier, 1973). More recently, Donald Black has shown the applicability of this hypothesis to the decision by urban Americans to invoke police intervention in their private quarrels (1971). And Philip Gulliver has explored the unique historical relationship between disputants as an aid to understanding the dispute process (1969b: 60).

3. A more complex dispute structure: the role of intervener. Although this very fruitful approach should certainly be pursued further, I will not do so here.[117] Instead, I will examine a special instance of the dispute process, which can be diagrammed as follows:

FIGURE 2



The additional characteristics which define this situation are: an audience for the claims, other than the parties themselves, who hears their claims, and who intervenes in the dispute in some manner.[118] These limitations represent a somewhat arbitrary circumscription of a broader field for purposes of the present inquiry; I do not claim to have defined a significant type of dispute, much less one which is distinctively judicial. Nevertheless, the structure thus delimited seems to me worthy of analysis: disputants commonly do bring their claims to another person, and his response is rarely entirely passive.[119] Within this dispute structure, I will concentrate upon the role of "intervener in the dispute." I have deliberately adopted that ugly neologism because it is free of the connotations which attach to such alternatives as judge, mediator, or dispute settler; where those additional meanings are appropriate, I will revert to the more common terminology. My choice of the role of intervener was influenced by additional considerations which should be made explicit. Because so many disputes involve such a role, it offers a common denominator for comparison between governmental courts and unofficial dispute institutions. The intervener is, moreover, an appropriate fulcrum for those instrumentally interested in social change; since the role is played by a limited set of persons under circumstances of relative publicity, it is more readily controlled than are the roles of disputant or other participant in the dispute.[120] Finally, the historical evolution of the role offers a fertile source of empirical data since many developing countries, and especially Kenya, recognized its mutability as well as its focal position in the legal process, and devoted considerable energy to transforming the indigenous intervener into a semblance of the European judge.[121]

B. Parameters for the Role of Intervener.

Just as the minimal definition assigned to the dispute process required us to develop variables by which to describe its protean forms, so we must select parameters with which to analyze the role of intervener. Again I will review the literature, though more selectively, for suggestions of structural variables which may help to explain the dispute process.

1. Authority. As we saw in the distinctions drawn above between legal and political process, authority is often isolated as a critical causal factor. Fallers has argued: "there appears to be a quite clear correlation between the differentiation of the bench, in terms of authority, and the legalism of the proceedings . . ."(1969: 329). Without inquiring here just what Fallers means by legalism, it is easily recognizable as a processual variable which he relates to the structural element of "respect and authority" (1969: 328). Although the latter notion is never explicitly defined, its content is suggested by Fallers' comparison of several African legal systems, arranged in order of increasing legalism. Among the Arusha, those persons who intervened in a dispute possessed influence by reason of their personal qualities alone, but lacked institutionalized authority. The only other pressure upon the disputants was dispersed among the totality of participants and thus could only be effective where there was a clear consensus. Indigenous Tiv leaders possessed political authority by virtue of their positions at the apices of the segmentary lineage system; the colonial government conferred additional judicial responsibilities upon a chosen few by making them civil servant chiefs. Members of the lozi *kuta* also combined adjudication with political and administrative tasks, but all these powers were derived from the traditional polity and merely recognized by European authorities. Soga judges, who otherwise resembled their Lozi counterparts, were barred from political activity under colonial rule. It is possible to isolate several variables of authority by means of these contrasts: influence/authority attached to an office; group authority/individual authority; authority endogenous to a society/authority imposed from outside; authority limited to disputes/authority exerted over a broad range of activity.

Pospisil also endows the term with a multiplicity of meanings. He notes that the authority of an individual, defined as the extent to which others follow his decisions (1958: 260-61),[122] varies in numerous ways, of which he singles out formality and absoluteness.[123] Authority is formal rather than informal if its exercise is circumscribed by norms and surrounded by ceremony and publicity. Authority is limited rather than absolute if it is shared with others, controlled by society, and if sanctions are imposed when its limits are exceeded. These analyses are a fertile source of ideas. But they should also teach us the folly of trying to subsume under the single concept of authority what is in fact a composite of rather heterogeneous qualities characterizing the structure of a dispute; clarity would be advanced by using distinct terms for the different variables involved.

2. Training. Weber followed a different tack entirely, perhaps because he was a lawyer reflecting upon legal systems which all seemed relatively authoritative, rather than an anthropologist studying those of Africa or Oceania. He took the extreme position that the nature of legal norms and the manner in which they are employed are primarily determined by the training required of legal specialists.

> [A] body of law can be "rationalized" in various ways and by no means necessarily in the direction of the development of its "juristic" qualities. The direction in which these formal qualities develop is, however, conditioned directly by "intrajuristic" conditions: the particular character of the individuals who are in a position to influence "professionally" the ways in which the law is shaped. Only indirectly is this development influenced, however, by general economic and social conditions. The prevailing type of legal education, *i.e.*, the mode of training of the practitioners of the law, has been more important than any other factor (1954: 97).

The significance of training may best be apprehended in situations where it influences the behavior of the intervener regardless of the amount of authority he possesses. Weber's own theory was undoubtedly affected by the extraordinary diffusion of "legalistic" thought among Continental legal scholars of the nineteenth century, who were wholly isolated from the direct exercise of decisional powers (Rheinstein, 1954: xliii ff.). The hypothesis gains further support from a contemporary example — the behavior of persons trained in another discipline, who are then elevated to a position of legal authority. The decision

in *M'Naghten's Case* in 1843 required that the insanity of an accused, when raised as a defense in a criminal prosecution, be determined by a typically dichotomous legal rule: that the accused did, or did not, know the nature and quality of his act; that he did, or did not, know that it was wrong. With the development of psychiatric knowledge during the past century and its gradual acceptance by the criminal law, psychiatrists have been asked for opinions about the insanity of an accused with increasing frequency, and these opinions have been accorded ever greater respect. The conflict between the psychiatric mode of assessment — employing a wide range of vaguely defined, highly abstract, partially inconsistent categories — and the legal rule became so acute that a choice between them was inevitable. But instead of judges rejecting psychiatric advice as incompatible with legal reasoning, psychiatrists had acquired such authority within the adjudicative process that their evaluations came to dominate the judicial determination of insanity without significant accommodation to the constraints of that process.[124] Hence psychiatric training better explains the process by which insanity is decided than does the presence of legal authority. However persuasive this illustration, Weber's claim for the centrality of training should not be accepted uncritically. My own observations about Kenya agree with Fallers' report on Uganda that the dispute process can alter significantly without the necessity for any change in the preparation required of the intervener. And there is also a great deal of evidence that training without more fails to alter performance.[125]

3. An alternative structural concept: role differentiation. The drawbacks identified in the use of these two concepts may serve to point us in a more fruitful direction. Each, although influencing process in significant ways, appears to provide only a partial explanation for the end result; each hints at other related concepts, and yet is not broad enough to incorporate them. I propose as an alternative a synthetic concept — role differentiation — an umbrella capable of sheltering a number of discrete variables, including both authority and training.[126] Catholicity inevitably carries a danger of vagueness. But this multifaceted nature is also what gives role differentiation the power to analyze highly disparate societies and yet to recognize complex and subtle differences among them. For this rea-

son, the degree of role differentiation has frequently been made the foundation of overarching social typologies intended to explain all facets of society, including the dispute process.[127]

Durkheim's theory of the division of labor is undoubtedly the best known example (1947). Durkheim was primarily concerned to show how the division of social roles, consequent upon an increase in "moral density" and population size, inevitably transmuted the cement of social integration from mechanical solidarity based on likeness into organic solidarity based on complementarity and cooperation. The social index he used to chart the progress of this transformation was the ratio of repressive to restitutive law. He found occasion, therefore, to comment briefly on the differentiation of the organs which administered that law.

> While repressive law tends to remain diffuse within society, restitutive law creates organs which are more and more specialized: consular tribunals, councils of arbitration, adminstrative tribunals of every sort. Even in its most general part, that which pertains to civil law, it is exercised only through particular functionaries: magistrates, lawyers, etc., who have become apt in this role because of very special training (1947: 113).

This theory of differentiation as a universal of social evolution of course had its predecessors (*e.g.*, H. Spencer, 1897-98), and has recently experienced a revival.[128] Aidan Southall has profitably applied the concept to study change in political roles in Africa, a subject closely related to our present concern (1965: 121, 125). And Richard Schwartz has stressed the differentiation of specialized roles for social control as a critical step in legal evolution (1954: 471).[129]

V. A THEORY OF THE DISPUTE PROCESS

I will examine changes in the role differentiation of the intervener as a possible explanation for the characteristics of the dispute process. My starting point is a highly abstract proposition presented by Fallers (1969: 329) as a paraphrase of Weber.

> Functionally differentiated groups tend to develop distinctive subcultures and to pursue "interests" defined by these subcultures. all the while further elaborating and refining ("rationalizing") them.

For the reasons given earlier, I will study the differentiation of the *role* of the intervener in disputes rather than that of the

group of such persons; one significant variable, after all, is when and to what degree interveners begin to function as a group rather than as unrelated individuals. In order to clarify the presentation of this theory, I have consistently traced the ways in which increasing differentiation of the role of intervener may influence the way in which he handles disputes, but I wish to stress that this is not the only possible relationship between these phenomena; structural change may also occur in the direction of lesser differentiation; and change in the dispute process may itself alter the structure of the institution in the direction of either greater or lesser differentiation.

The development of theories about how an institution handles disputes may proceed on many levels, from the most abstract and general to the most concrete and empirical. In this paper I have tried to advance our analytic capability on only a few of these levels. My general theories are largely an adaptation of the ideas of others, as the invocation of Weber and Fallers reveals.[130] I see my principal contribution as being rather to apply those theories to disputes by identifying a set of institutional attributes which can translate highly abstract concepts — such as differentiation on the one hand, and subculture or interest on the other — into variables at or near a level of specificity where they can be operationalized and studied empirically. Because the original stimulus for this exercise was the construction of a framework that would permit me to understand changes in Kenya, many of the variables are induced from unsystematic comparisons among the diverse institutions of that country, traditional and contemporary, indigenous and imposed. I hope to reverse that intellectual operation in future work, using the variables I have identified to compare institutions over time, or in different social units. Here, however, I have postponed that task in order to achieve wider applicability for the framework.[131] I have therefore not indicated the specific institutions in Kenya from which I derived the variables — each is, in fact, a composite of impressions; but I have sought to adapt those variables to account for the spectrum of dispute institutions described in the existing literature.[132]

The derivation of operational variables from general theory is not, of course, the end of the process; they must be combined into hypotheses that can be tested. Translation from the ab-

stract to the concrete necessarily results in an enormous proliferation of variables, as will appear below. Hypotheses linking those variables then take the form:

> *If structural variables a, b, c . . . have values* a_1, b_1, c_1, *. . . then processual variables, A, B, C, . . . will have values* A_1, B_1, C_1 . . . .

This multiplicity of variables can be handled in several ways. Many may quickly be discarded as irrelevant, poorly conceived, or difficult to operationalize; some may turn out to be substantially identical; others might be combined into more general concepts. If the remaining variables can be quantified, several constitutents of structure and process can be related. Where this is not the case, all but one variable must be held constant for any correlation to be meaningful. Absent an experimental situation, that nearly impossible goal can only be approximated by choosing for comparison either two highly similar units or the same unit at slightly different points in time. Even these latter alternatives may not be available: judicial administrators, particularly in the developing nations, appear to have conceived their office as a license to engage in uncontrolled experimentation (Phillips, 1945: 3). Thus a hodgepodge of innovations may have been introduced simultaneously, no unit maintained as a control, and the results either not observed or recorded with insufficient accuracy (cf. Campbell, 1969). If the rigorous standards of scientific explanation cannot be met, the best these variables will permit us to achieve is what Merton calls post-factum sociological interpretation — an account of the observed data which makes sense but is not subject to falsification (Merton, 1967d: 147). At the least, this points the way toward plausible hypotheses for further investigation in situations which permit greater control of the other variables.[133] The precise use to which these variables can be put will obviously depend on the factual situation to be analyzed and the data available; accordingly, I have not proceeded any further in the construction of hypotheses.

A. Structural Differentiation.

I will begin with the structural dimensions of dispute institutions, and elaborate the ways in which the concept of dif-

ferentiation may be operationalized. (Structural variables will be numbered S1, S2, etc., to distinguish them from the processual variables, which are numbered P1, P2, etc., and are discussed in Part V.B.2 *infra*.)

1. Specialization. Analyses of the differentiation of a particular role generally stress the element of functional specialization.[134] The specialization of the intervener may be measured in several ways.

S1. Time devoted to performing the role.[135]

S1.1. Absolute: How much time does the role occupant (intervener) devote to the specified function (intervening in disputes)? Performance may vary as the task is repeated.

S1.2. Proportional: What proportion of his time does the intervener devote to this task compared with the proportions he devotes to other tasks? In a society where most people allocate their time fairly equally among a large number of tasks, a slight increase in specialization in one of them may have significant consequences. Where some degree of specialization is common, only something approaching complete specialization may influence performance.

S1.3. Cumulative: For how many years does the role occupant perform that task, even if only sporadically?[136] Again, measures of both the absolute number of years and the proportion of the average life span may be significant.

S2. Role independence.

S2.1. Can the role be performed independently of other roles? To put it the other way round, are there other roles which the intervener is obligated to perform? How many roles are thus combined and what are they?[137] The mother who intervenes in a dispute between her children is obligated to perform a nurturant role as well; the policeman who intervenes in a family squabble must continue to play a law enforcement role;[138] but western judges are largely released from other role obligations.

S2.2. Does performance of the role *preclude* performance of any other roles?[139] which and how many? These are both aspects of one of the most common definitions of differentiation: the division of what was a single role into two roles which are, or can, or must,[140] be performed independently.[141] Prescriptions

may be less important than socioeconomic conditions;[142] for instance, the role of judge cannot be disengaged from the role of subsistence farmer until the judge's salary permits him to forego the latter activity.

S3. Number of role occupants. What proportion of the population performs the role of intervener at all? A decline in numbers — absolute and proportional — is one possible consequence of increasing specialization;[143] it is also one prerequisite for the formation of a group of specialists.

S4. Specialization among interveners. Whereas the frame of reference above was intervening in a dispute vis-a-vis other functional roles in society, here it is the internal structure of the dispute institution. The modes of internal specialization discussed below will have further consequences for the time spent in the sub-role, the independence of the sub-role, and the number of occupants in the sub-role.

S4.1. Is there functional specialization within the dispute process; *i.e.*, is each role assumed by every participant, or are different roles performed by certain individuals? (Biddle and Thomas, 1966: 34) The existence of an intervener distinct from the other participants is already a form of internal functional specialization. Western courts immediately suggest the roles of attorney or prosecutor as instances of further sub-specialization, but the presence of a bailiff or process-server may be equally important.[144]

S4.2. Does the intervener specialize in the kinds of disputes he entertains?[145] We are familiar with the concept of subject matter jurisdiction, which may admit only certain issues or otherwise exclude disputes by reason of the amount in controversy or the nature of the relief claimed.[146]

S4.3. Does the intervener specialize in hearing disputes only after they have been heard elsewhere? Appellate review is the most familiar example, but an intervener may also refuse to act until some other, often non-judicial, process has first been completed.[147]

These variables of specialization are frequently singled out for extensive discussion: they are unquestionably important, they are clearly distinct from process, and they allow of quantitative measurement. Fallers, however, appears to claim more — a causal relationship with respect to the entire culture of the dispute process (1969: 329). This strikes me as a dubious hypothesis. The role of intervener can be differentiated in many other ways; it is certainly possible that some such difference — for instance, an increase in the amount of remuneration — might lead to greater specialization, or to a change in performance without specialization. We clearly know too little at present about the interrelationship between functional specialization and other forms of role differentiation to assert that one is prior or more significant.

2. Differentiation. Nevertheless, we cannot investigate every difference among interveners in disputes. I tentatively suggest two categories of variables, related to those already discussed, which also appear to me to be significant for an understanding of process. The first I will call the social distance of the intervener, his remoteness from the disputants. The second is the cultural differentiation of the intervener. In choosing the latter, I have transformed a dependent variable suggested by Fallers into an independent variable which explains the dispute process. Earlier I argued the relativity of the distinction between structural and processual variables. The subculture of the intervener can usefully be seen as a processual quality which develops with functional specialization; but that subculture, regardless of its origins, can also be treated as a structural property of the intervener which is responsible for other characteristics of his behavior in the dispute process. Both social distance and cultural differentiation are likely to be important variables in a developing society where stratification is replacing egalitarianism and traditional homogeneity giving way to cultural pluralism engendered by changes which

are, or at least are seen to be, imitations of an alien competing ideology.[148]

As we saw above, specialization in the role of intervener could be measured with respect to two frames of reference: the larger society, and the dispute institution. Thus, the role of intervener may be functionally independent of other roles in the society, *e.g.*, the role of farmer — or of other roles within the dispute institution, *e.g.*, the role of recorder (secretary), or of enforcer (sheriff). Similarly, the social distance and cultural differentiation of the intervener may have meaning from each of these perspectives. With respect to a given social unit, an intervener who must be visited in a far-away capital will be socially more distant than one who travels to the unit to hear the dispute. With respect to the dispute institution itself, an intervener may be socially distanced from the other participants if he is given a distinctive physical location for the hearing, *e.g.*, a raised dias. Because the explanatory variables of role differentiation shade imperceptibly into the processual qualities I seek to eplain, I will adopt the strategy proposed earlier of proceeding from the more to the less distinct. Where it is not otherwise clear from the context, I always describe differentiation as increasing.

S5. Physical locus of the intervener.

S5.1. Is the intervener peripatetic or fixed?[149]

S5.2. If peripatetic, is his location chosen to suit the disputants (*e.g.*, at one of their homes),[150] the subject of the dispute (*e.g.*, a contested boundary) (Holleman, 1952: 30) or the intervener (at his home or office)?

S5.3. If fixed, how convenient is it to the disputants, and how convenient to the intervener? This is a function of distance, population density, ease and expense of transporation. The poles might be represented by a judge from the provincial capital who periodically visits each local court on circuit and a judge who remains at the capital and must be visited by all disputants.

S.6. Temporal scheduling of hearing by intervener. Variations in scheduling the airing of the dispute before the intervener might be analyzed in much the same way as variations in physical locus.[151]

S7. Physical environment of the dispute institution.[152]

S7.1. External environment. Are the physical surroundings or paraphernalia of the dispute institution distinctive? The distinguishing feature could be a tree under which the participants meet or stools on which they sit, or it could be the ornate courthouse they occupy; it might be significant whether the building is multi-purpose or single-purpose. Does the physical environment segregate the participants in the dispute from others, for instance by enclosing them in a house?[153] Does it force them to associate with strangers, by opening the hearing to a community alien to the disputants?

S7.2. Internal setting. Does the physical environment demarcate the intervener in any way? Does he sit in a circle with the other participants or does he face them; is he raised on a dias?[154]

S8. Community served by the intervener. The larger and more diverse the community, the more differentiated the intervener.[155] Byond this, the way the community is defined may be important.[156]

S8.1. Are there limits[157] upon the persons who can use the dispute institution (personal jurisdiction)? These may be framed in terms of kinship (actual or fictive), membership in age-groups, religion, ethnicity, etc.[158] If an intervener operates across such categories, how heterogeneous is the population subject to his jurisdiction?

S8.2. Are there geographic boundaries circumscribing those who can use the dispute process (territorial jurisdiction)? How large is that unit? Physical size must be interpreted in the light of population density and ease of communication.[159]

S9. Social isolation of the participants.

S9.1. Some participants (the disputants, their witnesses and supporters) may be socially isolated from others (casual observers, interveners) and from the community in which the dispute is heard, if the former travel outside their own community for the hearing.[160]

S9.2. The intervener may be isolated from the community in which he sits, and to which the other participants belong (whether that community is defined by kinship, territory, lan-

guage, or culture) by being posted away from his home, rotated periodically,[161] and prevented from bringing his family with him.[162]

S10. Economics of the dispute institution.

S10.1. Is this institution distinguished from others, in terms of the costs to the participants or the requirement that costs be paid in money rather than in kind or in services?[163]

S10.2. Are there differential economic consequences for the participants in the dispute? Do both disputants pay the fees, or just one? In some cases, all participants may share the costs, including the intervener. Do all participants share equally in consuming the fees, for instance by feasting, or do only some benefit, for instance the intervener?[164] Is this intervener distinguished from others, and from the participants in the dispute, by the enhanced status which accompanies a cash salary in a semi-monetized economy and a high salary in any society? Do other perquisites attend the role, e.g., housing, or a car, trips to the capital, or travel abroad? Does he receive remuneration directly from the disputants, or from another source?[165]

S11. Training for the role of intervener.

S11.1.a. Training may be inherent in the process of socialization experienced by all or a substantial segment of the population — through participation in disputes as well as in other ways.[166]

b. Beyond the acculturation common to society at large, additional educational qualifications may be demanded, which are acquired by only a few. In extreme situations, traditional acculturation may disbar one from the role.[167] If either education itself, or the money necessary to obtain it, is differentially distributed according to socioeconomic class, ethnic group, or religious or cultural background, incumbency in the role of intervener will be similarly restricted.

S11.2. Occupants of the role may receive further training which accentuates these differences.

S12. Authority.[168]

S12.1. Does this dispute institution possess significantly more authority than other social institutions? In the extreme situation, one institution or set of institutions may come to monopo-

lize the authority to require certain acts and to inflict certain punishments,[169] or to alter status.[170]

S12.2. Within the dispute institution, is this authority shared among all the participants, or is it monopolized by the intervener?[171]

S13. Stratification between interveners and others. This concept, of course, is closely identified with social distance and a frequent concomitant of cultural differentiation. It is implied by the preceding five variables[172] and has consequences for the next three. Nevertheless, it may be useful to regroup these indices and ask explicitly whether the interveners come from a higher social stratum than the disputants, and if so, how much higher. Strata may be significant in terms of the economic resources they possess, the political authority they wield, or the prestige they receive. They may be distinguished from the rest of society by such marks as ethnicity, religion, sex, culture, age, etc.[173]

S14. Development of group cohesiveness among interveners. Do the interveners function in isolation from each other, or have they begun to cohere into a group with a distinct subculture? Group cohesiveness may be fostered by:

S14.1. Similar, distinctive social or cultural background (*i.e.*, stratification);

S14.2. Receiving apprenticeship or education under the same conditions, or as a group;[174]

S14.3. Long service in the role;

S14.4. Contact among role occupants as part of their role, in the course of business or by periodic meetings;[175]

S14.5. Communication among role occupants;[176]

S14.6. Exclusion of non-role occupants from the group;

S14.7. Internal organization of the group;

S14.8. Common political or economic interests.[177]

S15. Physical appearance of the participants.

S15.1. Do the participants in the dispute assume a different dress from their ordinary attire? We are accustomed to a certain formality of dress in western courtrooms.[178]

S15.2. Is the intervener so distinguished from other partici-

pants? The mark might be a mask (Harley, 1950), the staff or blanket of the African elder (Kenyatta, 1953: 201), or the wig and gown of the English judge, widely copied in colonial Africa.[179]

S16. Behavior of participants.[180]

S16.1 Do the participants behave in a characteristic manner during the dispute?[181] They may be more solemn, or riotous;[182] gestures may be exaggerated or subdued;[183] speech may be more or less eloquent, or employ a different vocabulary[184] or language.

S16.2. Does behavior during the dispute differentiate the intervener? He may himself act differently; for instance, he may be privileged to display emotion although others are not,[185] or compelled to hold aloof while the other participants socialize.[186] The others, too, may isolate him by their respectful demeanor or mode of address;[187] they may even be precluded from communicating with him at all.[188] The intervener may speak another language from that of the other participants, or the same language with greater eloquence.[189]

3. **Bureaucratization.** The concept of differentiation, as applied to the dispute institution or to the role of intervener, does not entirely satisfy me. It can refer to any difference between or within institutions; as the miscellany of variables just discussed reveals, this amorphousness is not altogether eliminated by restricting our view to those differences I label social distance and subcultural variation. Is there another concept which will further select among differences and group them in some way? One possibility is suggested by Weber's theory of bureaucracy: the dispute process may change as the structure of the dispute, especially the role of intervener, becomes increasingly bureaucratized (Gerth and Mills, 1946: Ch. 8).[190] Many of the variables already discussed may be encompassed within the concept of bureaucracy. Indeed, functional specialization, social distance, subcultural differentiation, stratification, and bureaucratization all overlap considerably. Nevertheless, it will be helpful to discuss separately certain additional characteristics of the bureaucratic role.

S17. Criteria for selecting intervener.

S17.1. Are the relevant qualities ascribed (*e.g.*, age, sex, kin-

ship, membership in some other group) or achieved (*e.g.*, experience, education)?[191]

S17.2. If ascribed, how large a proportion of the population possesses that quality? How many such qualities are considered in selection?

S17.3. If achieved, are they qualities which refer to the whole person (manliness, honesty, leadership) or are they narrowly defined technical skills of particular relevance for the performance of that function (literacy, esoteric knowledge)?

S.18. Method of choosing the intervener.

S18.1. Does this occur by ascription, self-selection, election, or some combination of these, or is the intervener appointed by a superior or by his peers? This variable is obviously closely related to the preceding one.

S18.2. How is the intervener removed — by impeachment or recall, or by his superior or peers?[192]

S18.3. Is the intervener chosen anew to perform that role in ecah individual dispute,[193] or does he function in every case, or in a selection of cases chosen by some mechanical principle[194]

S19. Training. Once the intervener is appointed on the basis of his achievements, training may emerge as an important prerequisite. Any training would differentiate the intervener from other roles which do not receive it; but with bureaucratization, the nature of the educational experience changes.

S19.1. Technical competence is emphasized rather than qualities of the whole man, such as sportsmanship or humanistic knowledge.

S19.2. This competence is acquired by formal training rather than apprenticeship.

S19.3. It is demonstrated by examination rather than by the accumulation of experience measured chronologically.

S.20. Remuneration for performing the role.

S20.1. Is the amount variable or fixed?

S20.2. Is it based on the services rendered (in terms of quantity or quality),[195] or on rank within the ubreaucratic hierarchy.[196]

S20.3. Is it paid out of the proceeds of the particular dispute (*i.e.*, the contributions of disputants and other participants), or from some other source, *e.g.*, a fund drawn from many disputants, many interveners, or even from other institutions?

S21. Occupation of the role as a career.

S21.1. Preparation becomes long, arduous and expensive; it must be commenced early in life; it is also constricting — transfer to another career is difficult or impossible.[197]

S21.2. The occupant progresses up a graduated hierarchy of ranks.

S21.3. Tenure in the role is relatively secure.[198]

S22. Social status conferred by role. Occupancy carries with it privileged social status, in part a concomitant of economic position but also following from the educational prerequisites of the role. This status may come to be associated with the role itself, independent of such other characteristics. In the extreme case, it may be guaranteed by express rule, enforced by sanctions. This complements my earlier suggestion that one way to differentiate the role was to draw occupants from a particular stratum of society; here I argue that bureaucratization of the role further differentiates that stratum.

S23. The role is defined by explicit prescriptions rather than implicit custom. These change from oral to written, vague to precise, partial and incomplete to exhaustive, few to numerous, hodge-podge to organized;[199] thus they become a form of esoteric knowledge possessed only by role occupants. The norms:

S23.1. Demarcate private life from official business, especially with regard to finances;[200]

S23.2. Demand full-time commitment to and regular performance of the role in place of activity which was part-time and erratic;

S23.3. Obligate the occupant to perform the role as a duty where he previously performed it of his own volition;

S23.4. Circumscribe the powers of the intervener;

S23.5. Regulate conduct within the dispute institution.

S24. Enforcement of role expectations. Adherence to these norms is enforced by external rather than wholly internalized sanctions.[201]

S24.1. Interveners act individually rather than collegially, and can be held personally responsible.

S24.2. These actions are recorded in writing in order to preserve them accurately.

S24.3. They are subject to review by a superior.

B. Process

What aspects of the dispute process will respond to changes in the structure of the institution and the role of the intervener? The earlier review of process forewarned us that it is a highly variable phenomenon. In order to narrow the scope of our inquiry to a manageable set of parameters, I will begin by considering the mechanism by which differentiation affects process. H.L.A. Hart hints at such a connection in his search for "the key to the science of jurisprudence" (1961: 79). He postulates an imaginary society — "a small community closely knit by ties of kinship, common sentiment and belief, and placed in a stable environment;" "the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation" (1961: 89). The structural quality which characterizes this society is clearly its overall homogeneity, and the concomitant low differentiation of the institutional framework for social control and disputing, although these concepts are not made explicit. Hart contrasts this ideal "pre-legal" society with the truly legal world which develops with increasing differentiation of the dispute structure (1961: 91).[202] In the latter, primary rules of obligation are no longer sufficient, by themselves, to guarantee the regularity and predictability of behavior without which social life is impossible. Primary rules become inadequate in three respects, each remedied by a distinct category of secondary rules, which together are responsible for the characteristic process of the differentiated institution. First, uncertainty arises whether the institution will employ all the substantive behavioral rules of the larger society from which it is now differentiated — and only those rules — and whether it will modify them in any way; this dimension of choice is regulated by secondary rules of recognition (1961: 92-93). Second, differentiation of the institution insulates its primary rules from the gradual behavioral changes which constantly occur in the larger society; some new

mechanisms are necesary to amend those primary rules, and these are the secondary rules of change (1961: 93-94). Finally, there is the question of how the institution is to regulate its own actions in handling disputes, since the larger society from which it springs contains no norms which speak directly to such novel behavior; secondary rules of adjudication serve this purpose (1961: 94-95). If these three kinds of rules constitute the essence of the more differentiated dispute process, they are an obvious focus for our study. However, where Hart is engaged in jurisprudence, and thus concerned exclusively with the rules which should govern dispute institutions, I am trying to develop social theory, and therefore am equally interested in both the norms and praxis of those institutions.

1. **Generalizations about processual change.**

a. **Rationalization.** Can we generalize about the variation in the mode of choosing, modifying and applying norms in the course of handling disputes, which might follow from these structural changes? I will pursue Weber's suggestions concerning the consequences of increasing functional specialization, role differentiation, and bureaucratization. Fallers' paraphrase of Weber refers to the growth of a distinctive subculture and of certain interests. The subculture develops in the direction of greater rationalization, which Fallers interprets in the legal context as meaning greater "legalism" — an "ability of judges to deal with moral issues 'legalistically' — that is, to deal with 'artificially' narrow moral issues . . ." (1969: 17).

> A legal culture cuts into this complex "objective" moral reality in a highly "arbitrary" way. It is characteristic of the legal mode of social control that rules are used to arrive at simple dichotomous moral decisions - "yes" or "no" decisions that in other contexts would seem intolerably over-simplified morally. The legal process does not ask: What are all the rights and wrongs of this situation - on both sides? Rather, it asks: Is John Doe guilty as charged? (1969: 13).

Rationalization in law is thus identified with arbitrariness and artificiality narrowness and over-simplification, and dichotomous decision-making. These qualities do appear to share a common core, but they are rather vague, and their connotation strongly pejorative; it is especially difficult to know what content to

attribute to terms like "arbitrary" or "artificial."

Weber's own use of the concept of rationality as applied to law was very different, and considerably broader. Without exploring all the ramifications of this extremely complex idea,[203] it is sufficient here to observe that it can refer to logical or aesthetic form. Although all dispute processes will display some patterning of behavior,[204] and hence some kind of rationalization, the mode of rationalization will depend on the structure of the dispute institution. My expectation is that, as structural differentiation increases, the logic, the aesthetic of behavior within the dispute process will become more autonomous, internally coherent, and independent of patterns in the larger society.[205] One example of such a transformation might be the evolution Maine claimed to see in the outcomes of disputes, from the isolated, unconnected *themistes* of early Roman law to the highly organized body of opinions in the later period (1950: Ch. 1). Once this coherence is achieved, Hart's secondary rules of change are essential to preserve that coherence in an unstable environment.

Process can become internally coherent only at the cost of turning away from the outside world. The institution develops a carapace, impermeable to external information, prescription, or influence.[206] Behavior grows introverted, preoccupied with its own norms and activities. The problems it handles are the problems defined by the institution, not the society;[207] the solutions it generates are solutions for the institution, not the society.[208] If carried to an extreme, the dispute process becomes wholly involuted, hermetical, the exclusive domain of specialists, and comprehensible to them alone.

b. Functional adaptation. We can also view structural differentiation in functional terms as redefining the environment within which the dispute process must be adaptive. Where the dispute institution is completely undifferentiated — where it is simply the whole society viewed from a particular perspective — it must respond to the demands of the society itself. But as the dispute institution is progressively differentiated, the constraints of the larger society are relaxed, allowing behavior within the insitution to become internally adaptive, to develop in such a way that its consequences contribute to the smooth operation of the institution.

Functional interpretations of this sort have been repeatedly attacked on epistemological grounds (*see, e.g.*, Hempel, 1968; Rudner, 1966: Ch. 5), and the telic imagery in the preceding paragraph clearly creates serious theoretical difficulties. But many contemporary writers have insisted that these pitfalls can be avoided (*e.g.*, Rappaport, 1968). The final answers to these fundamental questions are not a prerequisite to our use of functional theory as a heuristic device for generating hypotheses which can then be tested empirically without reference to their theoretical origin. I will try to demonstrate this by constructing a model for the functional analysis of dispute institutions adapted from Stinchcombe (1968: 80-101). Let me begin by conceptualizing a society in which the dispute institution is wholly undifferentiated (Hart's pre-legal situation). In this society, as in every other, daily interaction is constantly generating new disputes and continuing, or elaborating, old ones; I will call this category of disputatious behavior "D". At any given point in time this disputing has an aggregate level which I will call "H" because I believe it may be represented by a homeostatic variable.[209] By this I mean that the level tends to be relatively stable empirically; although there is a force (D) which constantly tends to disturb the level, H functions like a thermostat which, when disturbed, stimulates other activity which aids in restoring the pre-existing level of disputing.[210] This other activity is, of course, the behavior of the dispute institution (I). We can illustrate this sequence by a consciously simplistic anecdote: two individuals assert inconsistent claims to land (D), thereby increasing the level of disputing in the society (H+1); the entire society (I) meets to discuss those claims, and reaches an accommodation such that the parties cease to assert the inconsistent claims (H). This can be diagrammed as follows:

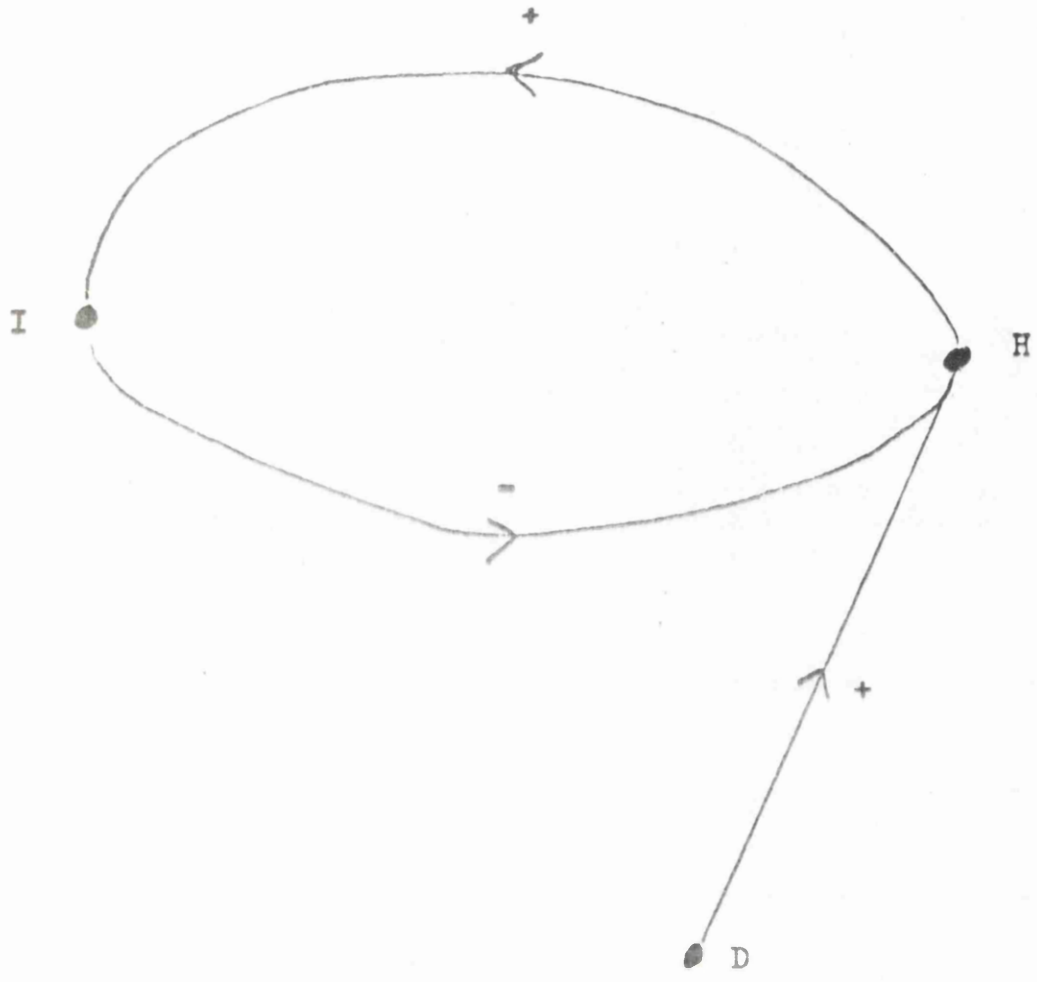


FIGURE 3. FUNCTIONAL ANALYSIS OF WHOLLY UNDIFFERENTIATED DISPUTE INSTITUTION

No actual society responds to disputes as a single, undifferentiated whole. Instead it has a set of dispute institutions (I_1, I_2, I_3 . . .) each of which is more or less differentiated from the society. Now when a new or revived controversy disturbs the level of disputing in the society, some of the disputes (D_1) are channeled to a particular differentiated dispute institution (I_1), disturbing the level of disputing within that institution (H_1). The increase in H_1 elicits a response within I_1 which tends to restore H_1 to its former level. But this response of the differentiated dispute institution can have either, or both, of two very different consequences for the larger society: it may reduce H; but it may not, and may instead contribute to disputatious behavior in the society (D). To illustrate again

by a variation upon the anecdote above: two individuals assert inconsistent claims to land (D), thereby increasing the level of disputing in the society (H^+1); this case (D_1) then goes to an official court (I_1), increasing the level of disputing within the court (H_1+1). The court may respond with an accommodation such that the parties cease to assert the inconsistent claims both inside the institution (H_1) and in the society at large (H). But the court may also respond that it has no jurisdiction over land disputes, and dismiss the case. This restores the original level of disputing within the court (H_1), but it may not affect the level of disputing within the society (H^+1), and may actually contribute to further disputatious behavior (D). The relationship between the differentiated institution and the society can be diagrammed as follows:

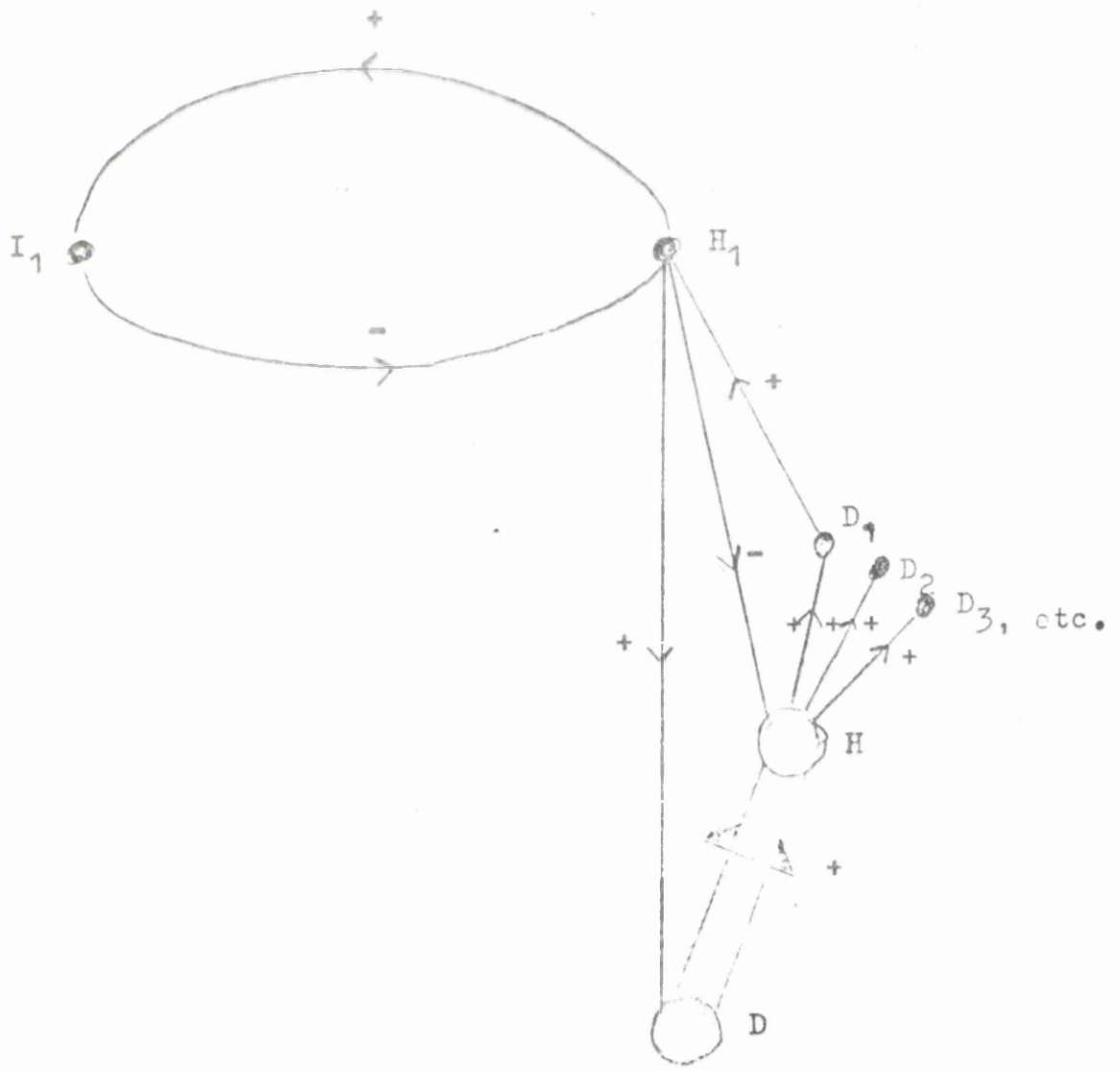


FIGURE 4: FUNCTIONAL ANALYSIS OF DIFFERENTIATED DISPUTE INSTITUTION

These models may help us to understand differences between the dispute process of the more and that of the less differentiated dispute institution, *i.e.*, between the response of I and the response of I_1. Functional theory suggests that as I_1 is differentiated from the society, its structure, by definition, diverges from that of the undifferentiated institution ($I_1 \sim I$), the disputes that reach it become increasingly different from the universe of disputes in the society ($D_1 \sim D$) and, most importantly, the level of disputing which the differentiated institution maintains diverges from the level of disputing which the society maintains ($H_1 \sim H$). The I_1 that is responding to a level of disputing ($H_1 + 1$), disturbed by selected disputes (D_1), so as to restore it to H_1, may perform differently from I. Let me illustrate this by selecting some miscellaneous examples from the detailed presentation of variables which follows below. I_1 may, as in the earlier anecdote, find that the dispute is not properly within the category D_1, that the institution therefore lacks jurisdiction, and thus decide to dismiss the case. I_1 may conclude that one or more of the parties or issues is not properly before it, and decline to address that party or issue. I_1 may refuse to hear proferred evidence. And I_1 may deny a remedy requested. Each of these behaviors is comprehensible as a response to the disturbance in the level of disputing within the institution; this response serves to restore that level by deciding the dispute, or the issues, by replying to the parties, or dealing with the evidence, or by answering a request for relief. The response *may* also reduce the level of disputing in the larger society; but as the institution is progressively differentiated, that coincidence of result becomes less likely. Instead, the internal functional integration of the institution creates patterns of behavior which leave the level of disputing in the larger society ($H + 1$) untouched, or even add to that disputing. Thus the differentiated dispute institution may become a complete inversion of its undifferentiated counterpart, aggravating disputes where the latter had pacified them.

c. **Bureaucratization.** Weber associates certain characteristics of process with a bureaucratic structure. These can be divided into two general categories, efficiency and certainty.[211]

The efficiency of a dispute institution can be measured in terms of the time, expense, or effort[212] expended in disposing of a dispute. It is important to note that only costs internal to the institution are conserved — the time, etc., of the intervener and other specialists; the process does not minimize the expenses of disputants or other unofficial participants.[213] Indeed, dispute institutions may be found which represent the logical conclusion of this tendency, producing an operational surplus after the costs of the specialists have been defrayed out of the contributions of the other participants.[214] One source of efficiency is an emphasis on finality: economy is obviously advanced by refusing to entertain a dispute beyond a certain point.[215] Hart, it is interesting to observe, also claims the virtue of efficiency for his secondary rules of adjudication (1961: 94-95).

The other consequence of bureaucratization — certainty — is a commonplace in discussions of modern legal systems.[216] Weber asserts that bureaucratic processes raise to an optimum level such qualities as "precision . . . unambiguity, knowledge of files, continuity . . . strict subordination" and predictability (Gerth and Mills, 1946: 206-07). Again finality makes a significant contribution, insuring that a decision, once announced, will not be altered. And here, too, there is a striking agreement with Hart's assertion that secondary rules of recognition dispel the uncertainty as to which social norms will be restated by the dispute process, and in what way they will be modified (1961: 92-93).

2. Operational indices of processual change. These general qualities — rationalization, logical or aesthetic coherence, functional adaptation, introversion or impermeability, efficiency, finality, and certainty — can be reduced to more precise measurements in numerous ways. The following is a tentative and very partial list. I have not stated explicitly how each specific measurement illustrates one of the general qualities because I believe the interconnection will be reasonably obvious. Often, moreover, a single operation lends weight to several of the abstractions, which overlap to a large extent; it may even be that some of the qualities are inseparable — different ways of stating the same thing. I have tried, whenever possible, to express each variable as a quality which increases with specialization, differentiation and bureaucratization. Where this is intolerably

awkward I have instead defined the polar extremes, pole "a" being the process associated with an undifferentiated, non-bureaucratic structure, and "b" being its opposite; there is, of course, a continuum between them. For clarity of exposition I have organized this discussion of the dispute process into stages which are roughly chronological. (Processual variables are numbered P1, P2, etc., to distinguish them from the structural variables, numbered S1, S2, etc., which were discussed in Part V.A. supra.)

a. Initiative and control in the dispute.

P1. Where the intervener was proactive, he becomes reactive.[217]

a. The intervener actively seeks out conflict in the society and channels it into a dispute; he collects information about disputes and intervenes on his own initiative.[218]

b. The burden rests on the disputants to transform conflict into dispute and to present that dispute to the intervener.[219]

This contrast between activity and passivity characterizes the behavior of the intervener throughout the dispute process — in the definition of issues, mobilization of evidence, etc. — as will be seen below.[220]

P2. At the same time, however, a good deal of control over the course of the dispute shifts from the disputants to the intervener — control not only over outcome, but over every step of the process.[221]

P3. The conjunction of these two factors determines the peculiar attitude of the intervener towards a settlement arrived at by the parties.

P3.1. Because the intervener seeks control over behavior within the dispute institution, neither one party alone, nor the two parties in concert,[222] can withdraw the dispute from the institution without his approval.

3.2. But because the intervener seeks to minimize his activity, he encourages parties to reach a settlement between themselves.

P3.3. The net result is a variety of devices designed to facilitate settlement between the parties after they have invoked the dispute institution,[223] while allowing the intervener a right to disapprove the settlement: such devices as plea bargaining, and pre-trial conference. With increasing differentiation, this right becoms a mere formality, and is exercised less often.[224]

b. Concept of wrong.

P4. The universe of substantive norms involved in the dispute process diverges from that employed by the society at large; law is distinguished from other norms — habit, custom, morality.[225]

P4.1. Not all social norms are recognized in the dispute process and the fraction so recognized continuously decreases.[226] At the same time, the process increasingly develops norms peculiar to itself; as a consequence the total corpus of norms expands. These two tendencies combine to produce an esoteric body of norms, known only to interveners and other specialists.

P.4.2. The content of each norm, which had been flexible and adaptable to the peculiarities of the case, becomes fixed in the form of a general rule applicable to all "like" cases. The number of cases which are seen to be alike, and thus governed by the same norm, increases.[227]

P4.3. Norms which were oral and vague are defined in writing with great precision.[228] When the undifferentiated institution must handle precise, written norms, it treats them as custom, without much attention to their exact wording,[229] the differentiated institution, on its own, rephrases custom in the language of statutes.[230] The criminal statute or administrative regulation displaces the proverb as archetype for all norms. This not only furthers certainty and ease of adjudication, but relieves the intervener of having to exercise a discretion which might lead to a reprimand.[231]

P4.4. Uncertainty whether a given norm will be recognized also decreases as the body of norms is more clearly circumscribed.[232]

P4.5. The body of norms is elaborated so that it becomes exhaustive, and organized according to some logical schema. The codification or restatement becomes the paradigm of a normative system.[233]

P5. The appropriate concepts of wrong had emerged piecemeal from a discussion of the dispute among the participants, to which all had contributed. Now the burden is placed on each party to invoke the norms on which he relies, offensively or defensively, at the outset of the dispute. An error in the selection of a norm will have increasingly serious consequences —

ranging from additional expense up to and including loss of the dispute — and rectification of error becomes more difficult, even impossible.[234]

c. Definition of issues.

P6. Because the normative universe has changed, certain of the issues on which the outcome depends will also be unique to the institution. It has been said, for instance, that the concept of *mens rea* only appears in more differentiated systems (*e.g.*, Driberg, 1934: 235; Hopkins, 1962: 2-3).

P7. The number of substantive issues entertained by the intervener declines;[235] only those issues essential to a decision are treated (*see generally* Bickel, 1962).

P8. Individual issues are defined more narrowly and precisely.[236] The criminal charge enumerating a clearly circumscribed list of elements, and the refinements of civil pleading, are the models (*cf.* Pound, 1928).

P9. Multiple issues are joined only if the proponent can demonstrate a close relationship between them.

P10. The intervener responds only to issues placed before him by the parties, even if those are superficial; he will not, sua sponte, seek to uncover more fundamental issues which may underlie the dispute.[237]

P11. Procedural issues tend to replace substantive; interest shifts from the outside world to the dispute institution itself.[238]

P12. The range of issues is defined early in the dispute process and cannot easily be expanded thereafter, nor can the parties contract the issues unilaterally.

d. Participation of disputants.

P13. The parties will be limited in number, usually to two. Additional parties will only be allowed to participate if they are closely related to those already involved.[239] Groups cannot dispute; they must identify representatives to act for them.[240]

P14. The disputants no longer play interchangeable roles. The roles of plaintiff and defendant become demarcated, fixed, and clearly defined. A defendant will not be allowed to assert an independent claim and thus reverse those roles.[241]

P15. The definition of who is a proper party to a dispute will change. Persons perceived by society as aggrieved will not be

permitted to appear in the dispute.[242] Actions brought in a representative capacity are discouraged; in order to reduce the scope of the dispute, the person who has been injured becomes the sole party in interest.[243] However, representation by a professional, who is an official or quasi-official member of the institution, increases the control of the institution over the dispute and is therefore encouraged.[244] The most striking instance, of course, is the development of a notion of crime out of a notion of civil wrong:[245] the differentiation of a single injury into two distinct injuries, one to the victim, the other to a larger collectivity, each of which may be redressed in different ways. At the extreme, the institution creates parties who have no existence outside it.[246]

e. Temporal limitation.

P16. Delay by a disputant in presenting his grievance to the dispute institution comes to affect the outcome regardless of whether or not the delay has had consequences outside the institution, *e.g.*, injurious reliance by an adversary or by another person.

P17. What constitutes a significant time period is calculated in terms of simple chronology rather than determined by the course of events.

P18. The period becomes shorter.

P19. The period loses its flexibility and becomes fixed.

P20. Delay is no longer merely a datum, from which inferences may be drawn about the unavailability of evidence, or the invalidity of the claim (A.L. Epstein, 1954: 14) — and which therefore may be possible to explain away — but becomes an ultimate fact determining outcome.

P21. The limitation may bar uncontroverted as well as controverted claims.

a. The intervener will refuse to consider stale claims only when liability itself is in issue.

b. The intervener will also reject claims in which liability is admitted and the only issues are the magnitude of the acknowledged obligation and the extent to which it may have been fulfilled.

P22. Even if a disputant presents a timely claim to the institution, the intervener may later dismiss it if the disputant

does not press the claim with sufficient energy, whether or not his adversary raises an objection of dilatoriness.[247]

f. Attendance by the disputants.

P23. a. The intervener will not proceed in the absence of any of the disputants.

b. The intervener will still try to reach the merits of the dispute although a party is missing (A.L. Epstein, 1952: 7); as the structure is further differentiated he may ultimately decide against the absent party by reason of his absence alone,[248] or have him brought to the forum by force.[249]

P24. The converse of proposition P23 is also true.

a. The intervener will always hear a dispute if the disputants are present.

b. The intervener may not act despite their presence, for reasons of his own (the press of business, the absence of key witnesses, etc.).

P25. In order to set aside an *ex parte* judgment, a disputant will have to expend more time and money, and substantiate one among a limited number of weighty excuses.[250]

g. Reception of evidence.

P26. a. Evidence may affect a dispute without being formally admitted *i.e.*, the intervener may act upon prior knowledge, or on information he obtains outside his role as intervener in the dispute institution. Indeed, the less differentiated the institution, the more information the intervener is likely to have.

b. The intervener may only receive evidence while occupying his role within the dispute institution, and may not consider evidence obtained in other capacities.[251] This is insured by increasingly formal constraints upon the reception of evidence: by noting the names of witnesses, recording the content of testimony, and reading it back to them for ratification; by prohibiting one party from addressing the intervener in the absence of the other; by insuring that the intervener is ignorant of the dispute at the inception of the hearing and thereafter controlling the information he receives.[252]

P27. The standard of what is relevant to resolve a controverted issue becomes increasingly narrow.[253] The intervener is less receptive to circumstantial evidence which can only be

connected to the point at issue by a lengthy set of inferences;[254] he prefers eye-witness testimony about the ultimate fact. Where circumstantial evidence is allowed, the chain of reasoning is rigid and divorced from the thought patterns of non-specialists.[255]

P28. The standard of what is admissible also becomes increasingly stringent.

P28.1. Certain evidence, otherwise material and relevant, may be excluded precisely because it offers a foundation for inferences common outside the dispute institution, but which the institution has foreclosed as impermissible,[256] or because it leads to factual conclusions which the institution has rejected as irrelevant.[257]

P28.2. Certain evidence may be excluded upon the rationale that, by doing so, the dispute institution advances other substantive goals.[258]

P29. Certain ultimate facts come to *require* the proof of certain proximate facts; other evidence, no matter how persuasive, is simply insufficient.[259] Thus treason requires two eye-witnesses; homicide, a corpus delicti; and rape, corroboration of the victim's testimony.

P30. The order in which evidence is received grows in importance,[260] to the point where certain evidence will not be heard until other evidence has been presented.

P31. Limits are placed on the quantity of evidence which will be received; repetition is discouraged.

P32. Participation in a dispute before an undifferentiated institution is governed by the same constraints as would influence behavior occurring outside the institution. As the institution is differentiated, participation is shielded from some of these constraints and subjected to others peculiar to the institution.

P32.1. a. Presenting evidence to the intervener is a voluntary act which a person performs out of self-interest or a sense of loyalty to the party he is supporting; equally, a witness may decline to testify out of a sense of loyalty or for other reasons. Consequently, a party calls witnesses partial to him, and does not call a hostile witness.[261]

b. Presenting evidence becomes a duty owed to the institution; it can and will be compelled.[262] Parties do call hostile

witnesses; on the other hand, a witness may be barred from testifying because of his bias in favor of a party (*see, e.g.,* Fisher, 1971: 737).

P32.2. a. Because of the publicity of the proceedings, a witness who testifies before the intervener will suffer the same social consequences as he would had he discussed those issues outside the dispute structure: namely, the diffuse informal sanctions of public opinion.

b. The differentiated institution protects a witness from the ordinary consequences of testifying, by a grant of privilege among other things.[203] Less publicity attends the hearing which may, occasionally, be held *in camera.*[204]

h. Evaluation of evidence.

h.1. Kinds of evidence.

P33. A preference for real evidence[205] is superseded by a preference for testimonial. Instead of objects from the outside world entering the dispute institution or being viewed by the intervener *in situ* (as in land disputes), parties and witnesses tell the intervener about these things.[206]

P34. Written evidence becomes more persuasive than testimony.[207]

P35. There is increasing reliance on expert evidence in place of lay testimony;[208] ultimately, expert testimony may be essential to prove certain issues. Experts frequently become assimilated to the body of officials within the dispute institution.[209]

P36. a. Acts and statements which occur during normal social intercourse outside the dispute institution are accorded greater weight.[210] Testimony before the intervener is discounted by reason of the substantial temptation to perjury in the heat of controversy. For example, in order to prove that *C* is the thief, *B* says to the intervener: "*A* told me yesterday [*i.e.,* outside the dispute institution] that he saw *C* hide the stolen goods." The intervener will tend to believe that he has criteria, drawn from ordinary social intercourse, by which to evaluate the truth of *A*'s alleged statement; but these criteria do not apply to *B*'s accusation within the dispute institution, about which he will be more dubious.

b. Statements made within the dispute institution acquire

greater significance because of the opportunity for the intervener to evaluate them himself. Because the intervener in the above example has heard *B*'s accusation himself, he believes he is able to evaluate its veracity. But he has not heard *A*'s alleged assertion, nor do the standards of the dispute institution govern statements made outside it; therefore he will tend to feel disabled from passing upon the content of that assertion. Ultimately, this disability will lead him to exclude evidence concerning statements made outside the dispute institution when those statements are offered to prove the truth of the matter asserted — as required by the hearsay rule.[271]

h.2. Standard of veracity.

P37. The norm itself changes.

a. The obligation to tell the truth during the hearing of the dispute does not differ significantly from expectations about veracity in other social situations (A.L. Epstein, 1954: 16). The value of truthfulness is only one among a number of competing influences, and may bow before personal loyalty to one disputant or spite towards another, the desire to curry favor or repay a debt.

b. The demand for truthful testimony becomes more explicit and more absolute; falsehood within the dispute institution is transformed from a moral infraction into a crime — perjury.[272]

P38. The means of insuring veracity change.

a. Primary reliance is upon norms of truthfulness, internalized during socialization and later reinforced by diffuse social sanctions. With increasing differentiation, supernatural sanctions may be superimposed, though only infrequently, in important and difficult cases where the evidence is inconclusive; they are invoked by oath or actually inflicted by ordeal, only on the parties themselves. Though they may be administered by the intervener, the outcome is frequently beyond his control[273] and occurs after the formal hearing has concluded and the disputants have passed out of his jurisdiction.

b. The dispute institution develops its own distinctive mechanisms for insuring veracity. Every participant — witnesses as well as parties[274] — takes an oath to tell the truth in every case. Breach of that oath is no longer left to supernatural pun-

ishment. Rather, perjury is deterred by the same sanctions which the dispute process imposes for substantive offenses.[275] At first, the intervener punishes perjury as it occurs during the hearing; but as the institution is further differentiated, the issue of perjury becomes a separate dispute, to be heard and disposed of by an independent intervener.

h.3. Means of evaluation.

P39. The burden of proof becomes increasingly rigid.[276]

P39.1. a. Every participant in the dispute, including the intervener, shares an equal obligation to contribute information relevant to the dispute.

b. This obligation is placed wholly on one of the disputants with respect to every material issue.

P39.2. The demands of the burden are more clearly defined.

P39.3. The amount of evidence required to satisfy it is greater.

P39.4. The burden of proof as a statement of probabilities about what occurred:

a. The party arguing the less probable chain of events — *i.e.*, the one more contrary to ordinary expectations — bears the onus of convincing the intervener that his version is correct.

b. The probabilistic origin is progressively forgotten. The party advancing a contention, whether common-sensical or extraordinary, must prove it. Expectations develop within the institution concerning who will advance evidence; these become demands which cannot be satisfied simply by showing that the proponent is favored by probabilities.

P39.5. The burden of proof as a statement of probabilities about who is more likely to have the evidence:

a. Failure to produce evidence which a disputant is believed likely to possess may be the basis for a circumstantial inference that the evidence is unfavorable.

b. Failure can no longer be excused by showing that the disputant lacks the evidence for good reason.[277]

P39.6. The burden of proof is more frequently based on ease of access to the information (P39.5, *supra*) — a consideration wholly internal to the dispute institution — than on the probability of events in the outside world (P39.4, *supra*).[278]

P39.7. Thus the burden of proof is transformed from a mode of inferential reasoning which interprets the presence or absence of evidence as suggesting certain other facts, into a mechanism for deciding the entire dispute.

P40. When the evidence is inconclusive because wholly absent or equally persuasive either way:

a. The intervener refers the dispute to the supernatural, abandoning control over the outcome (*see, e.g.,* J. Roberts, 1965; Middleton, 1966).

b. The dispute is decided by the burden of proof, a rule internal to the process.

P41. There is a shift in the frame of reference used to evaluate testimony, from a referent external to the dispute institution to an internal referent.

a. Testimony about behavior is compared with commonly held expectations about modal behavior which would occur in similar circumstances in the outside world.[279]

b. Expectations are still used to evaluate testimony, but now they are expectations concerning modal behavior *within* the dispute process:[280] the demeanor of a witness is compared with that of the modal affiant in order to determine veracity. Furthermore, the totality of statements made to the intervener about a given issue is carefully scrutinized for internal consistency. Where testimony presented to the intervener contradicts statements made outside the dispute institution, the former receive greater credence. Ultimately, the intervener may disregard evidence from a disputant or his witness which controverts testimony presented earlier to the same intervener, or even to another within the same system.[281]

P42. When expectations about behavior occurring outside the institution are used to evaluate testimony, those expectations are peculiar to the institution: the inferences are substantively different, and also more rigid.[282]

P43. a. The intervener actively seeks to assess truth and falsity.

b. The intervener is passive. He relies on the disputants to adduce all the evidence, and evaluates their *efforts* (*i.e.,* behavior inside the dispute institution), rather than the evidence itself, using criteria internal to the dispute institution,

such as burden of proof, estoppel, and presumptions.

P44. If the intervener determines that certain evidence is false, by any of the methods just discussed, the consequences he imposes are increasingly serious. These develop in the following sequence: the intervener seeks to persuade the party to admit his falsehood and concur in the truth (*see, e.g.,* A.L. Epstein, 1954: 11); the evidence is simply disregarded; an inference is drawn that the witness (and perhaps the party for whom he testifies) is generally untrustworthy, which affects the weight of other evidence;[283] a judgment is expressed about the affiant which, if he is a party, may influence the outcome; sanctions are imposed on the affiant in a separate proceeding (perjury or contempt).

45. One might summarize the changes described in the preceding section (h.3.) in the following abstract formula:

a. Data external to the dispute institution are used to make judgments within it.

b. Data internal to the dispute institutions are used to make judgments outside it.

i. Significance of prior decisions of fact.

P46. As the scope of each dispute narrows, so will the breadth of its impact upon future cases. Thus a dispute between two parties will not affect a third; the resolution of one issue will not influence the outcome of another.

P47. However, the demand for consistency, narrowly construed, will increase, *i.e.,* what happens within the dispute institution becomes more important than what happened outside it.

P47.1. It will be increasingly difficult to persuade the same intervener to reconsider a dispute if the parties and issues are identical.

P47.2. Other interveners within a widening ambit will be similarly disinclined to re-hear the dispute.[284]

j. Application of norms to facts.

P.48. As the scope of the dispute narrows, the number of norms invoked declines.

a. The intervener bolsters his decision with a large number of norms bearing little relationship to one another, and often only a peripheral significance for the controversy itself.[285]

b. The intervener affirms only those norms essential to reaching a decision; he may even explicitly disclaim any position with regard to other norms cited by the disputants.

P49. There is greater demand for consistency of norms, just as there was for consistency in decisions of fact.[286]

P49.1. Concomitantly, and perhaps as a necessary prerequisite, there is a narrowing in the definition of what must be consistent with what. Not only is the original intervener *presented* with fewer parties, issues, and facts to be adjudicated, not only does he limit the breadth of what he decides *himself*, but subsequent interveners use the distinction between holding and dictum to constrict still further what he *could have* decided.

P49.2. The intervener responds less to the pecularities of the instant case[287] and more to the attainment of harmony with other cases. The notion of what is normatively harmonious develops a logic peculiar to the institution and divorced from common sense categories — what we call legal reasoning (Levi, 1948). The purview of what is similar expands. The function of accommodating norms to the idiosyncratic facts of the case may be delegated to a distinct institution.[288]

P49.3. In order to achieve this consistency, the intervener must construct levels of norms intermediate between the general standards adapted from the society and the specificity of the disputes he handles.[289] As the institution is progressively differentiated, he first does this himself, by means of precedents[290] But with increasing differentiation, this function may be delegated to other more specialized institutions — legislatures[291] (and still later subdivided between them and administrative bodies) and legal scholars.[292]

P49.4. Norms at varying levels of generality are organized in hierarchical fashion (Moore, 1969).

P49.5. Whereas the general standards overlapped and contradicted each other, the more restricted norms tend to be distinct and compatible.

P50. These developments affect the way in which norms are changed.

P50.1. **a.** As long as norms are abstract, vaguely defined, unorganized, overlapping, and mutually inconsistent, the dispute institution can engage in gradual, implicit, limited normative

change by means of choice and interpretation.[293]

b. A norm with a narrow, ascertainable content, unqualified by any competing norm, resists change. As a result, there will be a tendency to distinguish the tasks of articulating norms and changing them. The latter function will come to be governed by its own clearly defined explicit rules.[294] Alternatively, the dispute institution may even lose that function altogether — as have those English courts which claim to be bound by their own precedents, or our own trial courts; instead, it will be delegated to another institution which specializes in normative change — appellate courts, courts of equity, or the legislature. These institutions will perform that function differently, often declaring radical, abrupt, comprehensive, explicit change.[295]

P50.2. Flexible norms facilitate change through reasoning by analogy; fixed norms demand the use of fictions.[296]

P51. As a result of propositions P49 and P50, the normative system becomes esoteric (Epstein, 1954: 7).

P52. For all these reasons, the logic necessary to apply norms to facts and to change norms — a logic which had been implicit — must become explicit.[297]

P53. As a further consequence, the dispute process, which had been entirely fact-minded (*see e.g.*, Fallers, 1969; Nekam, 1967; A.L. Epstein, 1954: 6), devotes increasing attention to norms,[298] although it never becomes norm-minded.[299] In part, this development occurs in emulation of other institutions, as discussed below.

k. Remedies.

P54. There is increasing use of remedies that advance the certainty and finality of a decision, *e.g.*:

P54.1. An act which can be performed within the institution rather than one which must be performed outside;[300]

P54.2. A single act rather than a course of conduct;[301]

P54.3. The transfer of property in substitution for the performance of an act;

P54.4. Fungible property (*i.e.*, money) rather than unique property.[302]

P55. Where the intervener would previously have sought to persuade the disputants themselves to agree to accept the

remedy, and would have modified it to secure their concurrence, he now frames it to meet criteria internal to the institution, without regard for the views of the disputants.[303]

P56. The remedy, like the norm it subserves,is precisely defined and fixed;[304] the range of available remedies narrows; consistency of remedy is emphasized.

P57. The remedy is a response to the dispute as narrowed by the process described above, not to the original dispute (Goldings, 1969: 88 ff.).[305]

P58. The remedy becomes increasingly severe.[306] One reason for this is a shift from special to general deterrence.

a. The institution is primarily concerned with the instant dispute. The remedies it employs are effective only between the disputants involved. They are sufficiently mild to encourage disputants to submit to the process.

b. The institution is concerned to anticipate future disputes of the same kind.[307] This is possible only if remedies are consistent, so that they serve as a warning to all those who may engage in similar conduct. The infrequency with which the remedy is inflicted is compensated by draconian rigor.[308]

P59. Coercion rather than persuasion secures compliance with the decision. The means of coercion become increasingly effective in the individual case.[309] Ultimately the dispute process will not only overcome resistance but also punish it.[310]

1. Review.

P60. Many of the above variables can also serve to analyze subsequent hearings of the same dispute by another intervener. The mere existence of institutions for review distinct from those which handle the dispute in the first instance is an example of internal specialization and differentiation within the dispute institution.[311] Consequently I would expect the dispute process conducted by a reviewer to differ from that of the initial intervener in the same ways, and to the same degree, as that of the intervener in a differentiated institution differed from that of his counterpart in an undifferentiated institution.

P61. a. Review occurred at the instance of one, and often both parties, who were dissatisfied with the earlier decision.

b. Review is frequently initiated by a superior of the intervener (revision).[312]

P62. The review process is progressively differentiated from a trial.[313]

P62.1. Preoccupation with facts is replaced by a concern for the content of norms. At the extreme, the first intervener can only decide the facts, and the second can only interpret the law.

P62.2. Instead of reconsidering the issues decided by the trial, review considers errors in the conduct of the trial.[314]

P62.3. The reviewer will progressively narrow the scope of the evidence he will entertain:

a. He will conduct a hearing de novo (Fisher, 1971: 741-42).

b. He will scrutinize the record of the earlier hearing and reach his own conclusions, but will only receive additional evidence for good cause (Smith, 1968:75).

c. He will decline to re-evaluate the evidence below, and will examine the record to detect egregious error.

P62.4. a. No greater weight is attributed to the outcome below than is accorded any other opinion on the dispute.

b. The decision of the first intervener is granted increasing weight, to the point where it may be practically unalterable on some issues.

P62.5. The response of the reviewer to perceived error below develops in the following sequence: he adjudicates the dispute on the merits; he corrects any error; he orders a new trial by the first intervener or another of like rank; he punishes the first intervener.[315] (He may, of course, do several of these.)

P63. The outcome of the review is communicated more widely. Whereas the initial decision is heard only by the disputants and other participants, the reviewer communicates to interveners: intially to the one he is reviewing, then to others of similar rank within his jurisdiction, and ultimately to all.[316] He may do so instead of communicating with the parties.

VI. DISPUTE INSTITUTIONS IN SOCIETY

This completes my elaboration of one possible microsocial theory of the dispute process, a theory which attempts to explain behavior within a given institution by means of certain antecedent behavior which I have demarcated as the structure of the institution. But that theory does not tell us which insti-

tutions we will find in a society. It is to this question that I now turn. My discussion will be shorter, more general, and more speculative; the full development of a macrosocial theory would require another essay.

I would like to caution at the outset against confusing microsocial and macrosocial theory.[317] I have thus far only offered an explanation for behavior within a single dispute institution. But every society will have a number of dispute institutions, which will display a range of values with respect to the structural and processual variables outlined above. A different kind of explanation will be necessary to account for the distribution of institutions across these variables within the society.

To begin with, the social environment confines these variables within fairly narrow limits. This may be seen most clearly with respect to the structural variable of functional specialization. There are few behavioral items which are performed without any specialization at all. True, in most societies, there is some behavior which approaches this extreme; the exchange of greetings demanded by ordinary courtesy may be an example. Yet even here, children are often excepted from social expectations;[318] furthermore, some societies exhibit substantial variation in the degree of specialization in even such commonplace behavior, as exemplified in the roles of recluse and politician. At the other extreme of the scale, complete specialization in a given function is always limited by competing biological and social demands; even the politician must eat and sleep, and perform other social tasks. Hence in all societies every task will be performed with varying degrees of specialization, to an upper limit peculiar to the particular society but less than total specialization.

These limitations obviously apply to roles within dispute institutions. There is always some variation in the degree of specialization in any of those roles. For instance, some people dispute more than others — perhaps adults more than children, or men more than women; in our own society, the role of disputant reaches extremes of specialization — as in the prosecutor, or the insurance company. The same observations are true for the role of intervener. In all societies many disputes proceed without the aid of an intervener; nevertheless, I believe that the role will be found in some disputes in every

society.[319] It may be performed with minimal specialization: most people intervene in disputes at least occasionally — in their families, among their friends, or in other social units; yet even in these situations some intervene more than others, and some not at all. At the other extreme, intervention appears to be a role which permits of, indeed encourages, a high degree of specialization; yet again there are upper limits. Similar constraints limit the range of other structural and processual variables, as a more extended analysis could demonstrate.

The situation we have to explain, then, can be presented schematically like this (I represents a dispute institution):

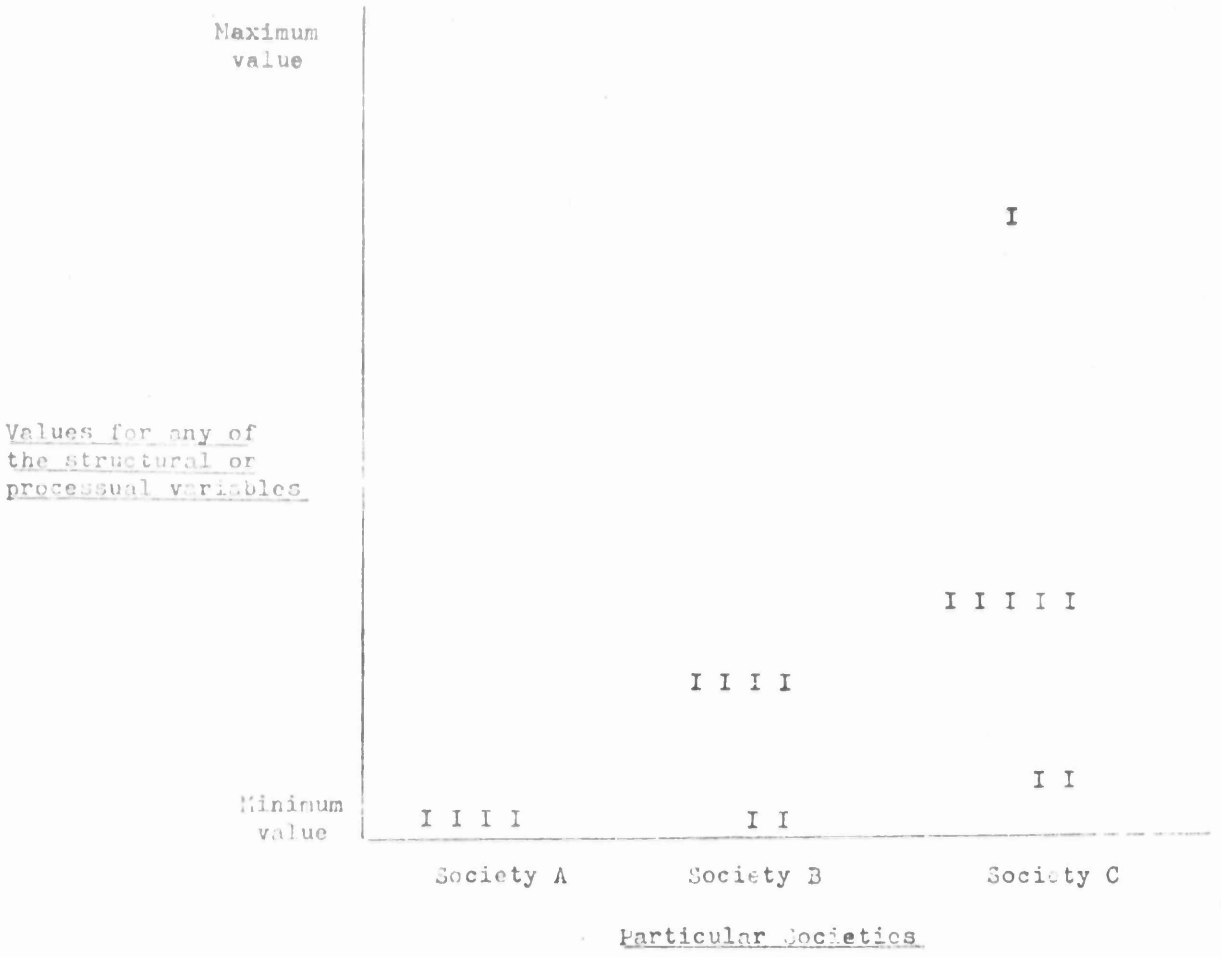


FIGURE 5: DISTRIBUTION OF DISPUTE INSTITUTIONS (I) IN DIFFERENT SOCIETIES

The questions I wish to answer are:

1. What social factors determine the upper and lower limits of variation in the kind of intervener that will be found in a society?
2. Within those limits, what social factors influence where the interveners will be grouped along those variables?

There is no reason to assume that dispute institutions are merely a passive reflection of society; rather, they exert a reciprocal influnce. I therefore want to know:

3. What are the consequences for society of having certain kinds of dispute institutions?

Finally, we must not ignore the possibility of conscious attempts to shape the characteristics of some or all of the dispute institutions in a society:

4. If an attempt is made to change the qualities of dispute institutions by deliberate planning, what can we expect to happen?

In answering these questions, I will begin by considering dispute institutions at the upper ranges of specialization, differentiation and bureaucratization, and thereafter turn to examine the lower ranges.

A. Dispute Institutions at the Upper Ranges of Specialization, Differentiation and Bureaucratizaton.

1. **What social conditions produce such institutions?** It is abundantly clear that social factors influence both the upper boundaries of these variables, and the extent to which institutions will be found near these boundaries. Institutions which appear to contradict the generalizations advanced below — for instance, a European court operating in an African tribal setting — can be explained as the product of what is actually a composite society — an amalgam of tribes under European colonial rule; this situation will be discussed as an example of conscious planning.

Dispute institutions are connected to society in two distinct ways. First, as an element of that society, the institution is influenced by the structure of society, and of other social institutions, and by the cultural values which accompany those structures. Second, because any given dispute institution represents only one way of handling a dispute among numerous

alternatives, the shape of an institution, indeed, its continued existence, will be influenced by disputant choice. A society will be characterized by certain kinds of social relations, which generate certain kinds of disputes; as a result, disputants will prefer certain solutions, and choose those institutions whose processes are most desirable.

a. Dispute institutions as a product of the social structure and culture of other institutions.

(1) Social density. The central theorem of Durkheim's classic work is that "the division of labor in any society is in direct ratio to the moral or dynamic density of society" (1947: 257). I understand the latter concept (which I call social density) to include such factors as the boundaries within which physical contact occurs, the physical proximity of individuals, and the likelihood that physical contact will result in meaningful interaction. An increase in social density will tend to produce an increase in social interaction,[320] and hence an increase in the number of disputes.[321] Unless the number of dispute institutions expands proportionately, each will have to handle more disputes; increasing caseload is an important factor in bureaucratizing an institution.

(2) Functional specialization. This is another response to increased caseload; cases, like widgets, can be processed more efficiently if they, or their elements, are treated as being identical. Specialization in different functional tasks is also mutually reinforcing: to the extent that A assumes more of function x, he frees B from having to perform it; moreover, A is now less able to perform function y, the burden of which is cast upon B (the actual development of functional specialization is obviously much more complicated than this). As a result of both of these tendencies, specialization is endowed with positive value; specialists are believed to perform the task with greater competence, and are correspondingly rewarded with higher status, more money, etc. This motivates every functionary to specialize further.[322]

(3) Social differentiation. An increase in the size of the social unit will tend to be accompanied by an increase in social differentiation (Kaplan, 1965: 93). Any increase in differentiation within the society — whether vertical socioeconomic stratification, or ethnic or religious heterogeneity — will tend

to increase differentiation *of* the dispute institution and *within* the institution. The institution will be differentiated from the society because its personnel will tend to be drawn disproportionately from one segment of the differentiated society.[323] The intervener will be differentiated, among other ways, by acquiring greater power; power is now necessary in handling disputes because the intervener has lost some of the authority he possessed in the more homogeneous society (Nisbet, 1966: Ch. 4); at the same time, greater social heterogeneity makes power available to him (Fried, 1967).

Social differentiation increases the complexity of behavioral patterns and norms, as well as the rate of change in each. Furthermore, social heterogeneity compels the development of more abstract, more universal norms capable of reconciling the values of different segments of the population. The task of handling disputes becomes more difficult, and requires special training. These factors together — specialization, social differentiation, enhanced power, the development of universal norms, training — contribute to the bureaucratization of the institution. In turn, bureaucratic patterns of behavior come to be valued, and are eventually identified with justice itself.

b. Dispute institutions as a product of disputant choice. Every society will display certain characteristic forms of social relationship, and will generate certain kinds of dispute; persons involved in these relationships will have preferences about the way their disputes will be handled. I would expect the following kinds of social relationship to produce the accompanyng preference for a dispute process.

(4) Social relations which fulfill a single, narrowly defined, purpose, as opposed to those which are multiplex and broadly defined (Gluckman, 1965b: Ch. 1): a dispute process in which factual inquiry is severely restricted in scope.

(5) Social relations which are instrumental, oriented toward other goals, as opposed to those which are affectual, goals in themselves: a dispute process in which the outcome is certain and predictable.

(6) Social relations which are transitory, dispensable, as opposed to those which are enduring, irreplacable: a dispute process in which the outcome is final.

2. What are the consequences for society of having such dispute institutions?

a. For the structure and culture of other social institutions.

(1) The social unit increases in size, because the dispute institution successfully handles new kinds, and larger numbers, of disputes, thereby avoiding secession, fission and fighting — alternative responses to conflict which diminish the size of the social unit.

(2) The social unit is further differentiated, partly because of the increase in size, but also directly as a result of the dispute institution (Etzioni, 1963). By handling disputes between socially distant, culturally differentiated individuals, it permits social contact to ripen into social interaction. In the course of handling these disputes, it creates new, abstract norms, thus enhancing overall cultural differentiation.

At the same time, the institution contributes to stratification. It becomes more costly: as it is specialized, differentiated, and bureaucratized; as the number of institutions decreases and they are geographically centralized; as the possiple levels of appeal proliferate, etc. In an economically stratified society, the rich have substantially better access to the institution than the poor. It is also socially and culturally more distant from some segments of the population than from others. Because the institution now has more power at its disposal, and greater control over economic resources, those segments of the population with greater economic, social and cultural access are able to use the institution to improve further their position in society (Galanter, 1972b).

(3) The value of specialization, differentiation and bureaucratization for other social institutions is elevated. Every institution engages in a process of self-justification; but the consequences of that process are far more profound where the institution is seen as embodying a fundamental social value — in this case, justice.

b. What are the consequences for the quality of social relations? The impact of the dispute institution here is much more restricted. In those disputes which it actually handles, it may transform relations between disputants from multiplex,

affectual and enduring to single-purpose, instrumental and transitory. Beyond this, the few people who expect to dispute may structure their relationships so as to make them amenable to the dispute process.[324] Others, who have not done so, may nevertheless anticipate that outcome by simply terminating the conflicted relationship on the most advantageous terms possible. But no institution and no dispute process has a monopoly over disputes; consequently, most disputes involving the vast majority of social relationships will simply be untouched by the more differentiated institution; the disputants will never approach it, either because they dislike the process it offers, or because the institution is inaccessible to them.[325]

3. Planned change in dispute institutions. The propositions advanced above assume gradual, evolutionary change in dispute institution and society. At least until the mid-eighteenth century, and with the exception of colonial situations, such change may have been the rule.[326] But in recent history it has certainly become the exception. This is most obviously demonstrated by the colonial experience of non-western nations, a major element of which has been the substitution of western dispute institutions for indigenous institutions, producing radical change in the directions sketched above. Moreover, political independence, rather than halting this process, has accelerated it.

Theories about the interrelationship between dispute institutions and society may therefore be less useful in predicting what changes will occur without deliberate intervention, than in revealing structural limitations upon planned change. In analyzing these limitations, it will again be useful to distinguish between changes in the dispute institution itself — its structure and culture — and changes in the social relationships among potential disputants.

The theory developed above, confirmed by the experience of numerous societies, explains why planned institutional change is not only possible but self-reinforcing. Indeed, such change, by its very nature, becomes progressively easier: specialization, differentiation, and bureaucratization mean a loosening of the interdependency between the institution and society (*see* Mayhew, 1971; Galanter, 1972a: 66). Furthermore, they decrease the number of professional actors involved, and hence require only

limited expenditures of resources; as many countries have discovered, the reform of legal institutions is relatively cheap, sometimes even costless.

Yet such reforms may be self-defeating if the larger purpose is to effect change in the society as well. By the very fact of their differentiation, such dispute institutions handle relatively few disputes; where they are deliberately differentiated in advance of other social changes, even fewer potential disputants will be linked by social relationships which permit of intervention by those institutions. The institutional isolation which is an inevitable concomitant of differentiation will be compounded by the mechanism of disputant choice.

B. Dispute Institutions at the Lower Ranges of Specialization, Differentiation and Bureaucratization.

If the above analysis were a complete picture of the social forces influencing the development of dispute institutions we might expect, in time, to find all such institutions grouped at the upper limits of those structural variables. These forces are, after all, pervasive in contemporary western society; even in many of the developing nations, where they are still weak, western institutions serve as models to be emulated; and social and institutional changes appear to be mutually reinforcing.

Contemporary theories of social change are in part responsible for the tendency to accept this analysis as adequate and comprehensive. More than a century after Darwin, sociological thought still reflects the enormous impact of evolutionary biology, although analogies between organism and society are now much more sophisticated.[327] Social theories of law are no exception. If few assert that all legal systems must pass through fixed identifiable stages, many still rank known societies according to a chosen variable, thereby suggesting a unidirectional and inevitable progression from one end of the continuum to the other.[328] Durkheim believed that the forms of social organization he identified represented points in a historical progression. Aidan Southall, writing recently, appears to be no less certain with respect to one of the structural variables which I have selected for emphasis.[329]

> No doubt empirical instances could be found in which the role structure of a society changes through roles becoming more generalized, diffuse, broad in definition, and fewer in number. such instances seem somewhat rare.... none of these instances exemplifies a process of role generalization within a society such as to contrast with the opposite internal process of role differentiation, which has occurred so very frequently in time and space....
> This prompts the conclusion that societies which persist through time without violent intervention from without either have been relatively stagnant, as in the case of numerous but very small and isolated nonliterate societies in many parts of the world, or else have exhibited a continuous process of role differentiation (1959: 20-21).

Yet we know that every society, no matter how differentiated some, or even many, of its dispute institutions may be, will still possess others at the opposite end of the spectrum. The theory must therefore be incomplete; the following are some suggestions about social forces which tend to preserve, or to produce, relatively undifferentiated dispute institutions.

1. Dispute institutions as a product of social environment.

a. As a product of the social structure and culture of other institutions.

(1) Functional generalization. There appears to be a discernible movement toward functional generalization, even if it is not yet as pronounced as the movement toward specialization which began more than a century ago. In part this may be a long range consequence of economic forces; where, for example, the early stages of industrialization demanded that the husband be employed full time outside the house, and the wife assume all household tasks in order to permit this, later stages may increase the leisure of both, permitting a convergence of spousal roles (in other social classes, unemployment may have the same consequence). In part, the trend may be an expression of cultural revulsion against specialization, most explicitly displayed by contemporary intentional communities, [330] but also visible in more established institutions. Where these developments are occurring, we can expect to find the role of intervener recombined with other functions.

(2) Levelling of social and cultural differences. This has, of course, been a persistent and potent force in many societies, including those displaying the greatest tendencies toward dif-

ferentiation, where it has perhaps been most pronounced. Whether one views egalitarian demands as an expression of class struggle, or as an ideology divorced from social class, their power is undeniable. We can expect such demands to be directed with special force at those institutions which are possessed of substantial authority, and endowed with symbolic significance by the society[331] — among which dispute institutions are a prominent example. Where the demands are not satisfied, we can expect to find them transmuted into pressures for the dismantling of the institution — perhaps altogether, perhaps into a number of institutions functioning within sub-units of the society, from which each is less differentiated.[332]

(3) Reducing bureaucratic autonomy. Just as egalitarianism opposes differentiation, so democracy opposes bureaucratic tendencies (Fogelson, n.d.). Again, we can expect this ideology to be directed with particular urgency against dispute institutions, where it will affect such matters as the choice and tenure of personnel, the separation of powers, modes of review, etc.[333] Furthermore, to the extent that pressures for greater equality lead to a fragmentation of the heterogeneous society into sub-units that are internally homogeneous, the demand for universal norms applicable to the total society — one of the *raisons d'etre* of bureaucracy — loses it cogency. Thus the cluster of values epitomized by the undifferentiated institution — functional generalism, egalitarianism, democracy — are mutually reinforcing. And just as highly differentiated dispute institutions find an exemplar to imitate (perhaps the United States Supreme Court, or the High Court of England or of other common law countries) so there are powerful models for the undifferentiated institution (the family court idea in America, perhaps, or an idealization of tribal institutions).

b. Patterns of social relationship which affect disputant choice. Despite the tendencies described above, many societies have been able to create and maintain highly differentiated dispute institutions. But there are additional factors which affect the extent to which those institutions will be used, and by this means influence which will survive and flourish, and which will decline and disappear. These factors are the kinds of relationships prevailing in the society — a variable far more resistent to change than the shape of any particular institution.

I would argue that in every society many social relationships — indeed, the vast majority — tend to be multiplex, affectual and enduring. This may have been obscured by nineteenth century social theorists who first perceived departures from that model, and consequently stressed their importance out of all proportion; Maine's influential dictum about the movement from status to contract (1950: Ch. 5) is only the most famous example of a pervasive attitude (*see* Nisbet, 1966: Ch. 5). More recently, however, observers have corrected this mistaken emphasis, recognizing that status relationships persist alongside contractual, that the latter often become the former, and that there may even be an equivalent, opposite movement from contract to status.[334]

What, then, are the consequences of the persistence of status relationships for disputant choice?

(4) Where social relations serve a multiplicity of purposes, broadly defined, disputants will seek an airing of a wide range of issues, involving numerous participants.[335]

(5) Where social relations are affectual, disputants will seek to maintain control of the dispute, avoiding external coercion, and subordinating abstract norms to the idiosyncratic situation.

(6) Where social relations are enduring and irreplaceable, disputants will seek to avoid finality, or a decision which favors one party to the exclusion of the others.

Yet even were these linkages to be substantiated, the consequences of disputant preference for the structure of dispute institutions would remain highly uncertain. Let us assume that disputants will seek to avoid an institution whose processual characteristics might be damaging to their pre-existing relationships. This might lead to a decline in litigation between private disputants in highly differentiated institutions; indeed, there is considerable evidence of such a decline in the courts of many different societies, although it is not yet fully documented.[336] A reduced caseload could have considerable significance for such institutions; among other things, it would diminish one of the pressures for bureaucratization. Courts might also respond to the loss of function — and also of prestige — by striving to alter their processual characteristics:[337] the replacement of rigid rules by more flexible standards in commercial

law, or divorce, may be examples. On the other hand, disputant preference may be a less potent force than I have suggested. Highly differentiated institutions tend to possess a monopoly of many powers: for instance, in many societies it is not possible to obtain a divorce, and the concomitant right to remarry, except from an official court; disputing spouses who want that remedy cannot avoid the court, no matter how repugnant its process.[338] Furthermore, courts have found that any space in their dockets is more than filled by a variety of quasi-administrative duties.[339]

Avoidance of highly differentiated institutions might also lead to a preference for less differentiated institutions, or pressure to institutionalize such dispute processes: resort to private family counselling, or the development of commercial arbitration may be examples. But these outcomes seem even more problematic. Intervention of any kind does not exhaust the range of responses available to potential disputants. If existing institutions seem undesirable, a disputant may choose to internalize the conflict, and thus deny that it, or the dispute, exists; or he may choose to "lump it," thereby terminating the relationship in much the same fashion as the dispute institution would do.[340] It may be that both of these responses are, in the long run, unsatisfactory, and lead to an increase in "anomie" and pressure for the creation of institutions which will handle the dispute differently; but we certainly have no evidence that such is the case.

2. **What are the consequences for society of having such dispute institutions** Our evolutionary, ethnocentric biases lead us to think that such institutions merely contribute to the maintenance of the status quo, and may actually inhibit change. Here I will try to show that they can be a force for social change as well.

a. What are the consequences for the structure and culture of other institutions?

(1) Increase the homogeneity and coherence of smaller social units, and thus their social significance. The relatively undifferentiated dispute institution, by definition, serves a smaller social unit. Smallness by itself increases homogeneity and coherence. The significance of a social unit for its members is always enhanced when it performs crucial social functions.

But beyond this, dispute institutions make a special contribution to social solidarity. Dsputing is itself an important form of social interaction.[341] More people participate in the undifferentiated institution; ultimately everyone is involved. Because the normative system of the institution comes to approximate that of the sociey, "justice is not only done, it is seen to be done" — a catchphrase which British colonial administrators frequently proclaimed, but could only subvert. Furthermore, the institution serves to foster a common normative system within the society. Economic stratification is diminished because everyone has equal, and total, access to the institution. Political disparities tend to be eliminated in the same way; furthermore, the institution does not create its own inequities. The egalitarianism of the dispute institution reinforces the sway of that value in society.

(2) Decrease specialization and bureaucratization. Because participation in the dispute nstitution becomes the duty of every citizen -- and an increasingly time-consuming one — it interferes with specialization in other functional tasks.[342] Moreover, political and social engagement become higher values than specialized technical proficiency. Because the dispute institution is non-bureaucratic, it inhibits bureaucratic tendencies in other areas of social behavior; the uncertainty and lack of predictability of outcome make rational planning increasingly difficult.[343] The dispute institution itself symbolizes other values: democratic control and the achievement of substantive goals rather than bureaucratic rationality.

b. What are the consequences of such dispute institutions for the nature of social relations? We know from numerous studies of tribal societies that undifferentiated dispute institutions tend to preserve and strengthen multiplex, affectual, enduring social relations. Can they have similar consequences within the subunits of a more heterogeneous society? Obviously, they must first handle disputes before they can bring to light latent multiplicity and affect in social relations, thus making those relations more enduring. But here the characteristics of the undifferentiated dispute institution render it a more potent influence than its differentiated counterpart. It is accessible and non-threatening; it is proactive, seeking disputes in which to intervene; it symbolizes values which come to be strongly held

by society. Finally, it contributes to the development of a cohesive, homogeneous society in which individuals no longer possess the isolation and privacy necessary to conceal their disputes.

3. Planned change in dispute institutions. Planned change is frequently thought to be synonymous with increases in specialization, differentiation and bureaucratization. Yet conscious attempts to diminish such qualities are no less interesting or important, if they have been relatively uncommon.[344] Innovation has occurred under three divergent historical situations. Radical transformations have been deduced from a revolutionary ideology and accompanied by thoroughgoing social revolution: examples might include the Napoleonic codification following the French Revolution (Merryman, 1969: Ch. 5); the establishment of popular tribunals in communist countries such as Russia (Berman and Spindler, 1963), parts of Eastern Europe (Podgorecki, 1969), and China (Lubman, 1967); and similar experiments under an umbrella of socialism in such members of the third world as Cuba (Berman, 1969), Chile (Presidential Message, 1971), Sri Lanka (Goonesekere and Metzger, 1970), Burma (Tun, 1972), and Tanzania (Georges, 1967). Conservative ideologies have been the inspiration for equally far-reaching changes: the efforts to revive traditional institutions under indirect rule in colonial Africa, and now in contemporary Rhodesia;[345] the aborted restoration of *panchayats* in India (Galanter, 1972a); recent increases in the power of tribal authorities in Malawi.[346] In most western nations, by contrast, the impulse has been reformist, and the changes more limited. American legal history offers numerous examples: the Field Codes[347] and the movement for election and recall of judges in the nineteenth century; legal aid, small claims, juvenile and family courts at the beginning of the twentieth century; and most recently the OEO legal services program, and the advocacy of "de-legalization."

This incomplete enumeration answers the threshhold question: it is certainly possible to effect such structural changes in dispute institutions. A detailed examination of the historical evidence, which would be necessary to determine the success and failure of particular experiments, is beyond the scope of this paper. But it may be instructive to compare the environment in which such changes are now being attempted with the

environment in which colonial and post-colonial governments have sought to foster the "modernization" of their legal systems, for such a comparison may permit us to generalize about the factors that inhibit change.

Colonial governments frequently had to overcome the resistance of the population to changes in their dispute institutions; but that resistance, *by* its very nature, tended to be unorganized and inarticulate — antipathy could only be expressed by avoiding the new institutions. Contemporary governments advocating "popular tribunals" may be able to generate substantial enthusiasm,[348] but this is likely to be as ineffective in support as in opposition; people may use the institution once it is created, but there is little, short of revolution, that they can contribtue to its creation.

The attitude of elites seems to be much more significant, especially the disposition of those who are, or may become, professional or quasi-professional participants in the dispute institution. In the colonial situation, two kinds of elites must be distinguished. Traditional elites — those with an economic or political stake in existing institutions — may oppose governmental innovation; however, such opposition can often be avoided by a policy of indirect rule which preserves — indeed, mummifies — traditional institutions while creating competing institutions alongside them. Modernizing elites — those who adopt the metropolitan culture and obtain western education — tend to be predisposed toward the new institutions (indeed, they are frequently more vehement in their advocacy than the colonial authorities themselves); any reluctance can generally be overcome by the offer of a position within the new institution, or an explanation of the advantages which may accrue from using the new institution. By contrast, the contemporary government, western or westernized, which seeks to implement the reverse changes will find the elite unanimously, and strongly, opposed.[349] This elite, especially the legal professionals, now possesses substantial political, economic, and cultural power — all of which is threatened by the proposed changes. The new institutions offer legal professionals nothing which might compensate them for that loss; the very qualities of the new institutions exclude them from positions of influence and insure that they would not, in any case, want such positions.

We may be aided in comprehending the significance of elite opposition by a brief review of some of the aborted reforms:

(a) If new or reformed institutions are merely added to the established institutional structure, the former are likely to come to resemble the latter. Established institutions continue to symbolize the way disputes ought to be handled. They receive the major allocation of societal resources.[350] Officials who staff them remain at the top of the status hierarchy within the profession. Juvenile courts were intended to offer a procedure radically different from the criminal courts in which juveniles had been tried; but the differences between the two have long been diminishing.[351]

(b) If dispute institutions are reformed without commensurate change in society, they may serve to perpetuate or even aggravate existing social conditions. Reform of the small claims court was diverted not so much by the aversion of the judges as by the activities of quasi-professional disputants: large institutional creditors, collection agencies, etc.[352] Furthermore, the dispute institution will only be able to handle existing inequities in political and economic power if it is endowed with considerable power itself, and imbued with a strong revolutionary ideology — both of which characteristics contribute to the differentiation of that institution.

(c) If innovative dispute institutions do not assimilate to more established structures, and if they are not captured by their more powerful clients, I suspect that they will frequently turn out to be a nullity. Social relations must to some degree antedate the institution if it is to have any disputes to handle. Were a tribal moot to be transposed to an urban American neighborhood, as has occasionally been proposed, I would not expect many people to use it. Extreme social differentiation — especially of work and home — drastically simplifies relationships; social heterogeneity and hostility inhibit affect; physical isolation and frequent moves readily interrupt those few, limited relationships that are formed. The marginality of Workers' Courts in Poland (Podgorecki, 1969), or the judicial panchayats in India (Galanter, 1972a), may be explained in some such terms.

These limitations upon gradual change do not necessarily apply to revolutionary situations; indeed, they may contribute

to the creation of revolutionary situations. There, the opposition of the elite to any change may fuel popular discontent with established institutions. Popular discontent may initiate change, and not simply adapt to changes initiated above. Competing models may be eliminated, inequalities levelled, and the social relations which demand such institutions may be born.

C. An Overview of Dispute Institutions in Society.

These observations allow us to begin to construct an explanation for stability and change in the dispute institutions of a society. I think we now have some insight into the way in which social factors influence the distribution of dispute institutions along the structural variables I have identified, and consequently some understanding of why this overall distribution is fairly stable. Each society has its characteristic, rather inflexible, limits for the values which those structural variables may assume for dispute institutions, or indeed for any institution. At the same time, it may be that the global changes subsumed under the notion of "modernization" are causing the limits in every society to come to resemble each other more closely; for instance, a supreme court has become as essential a symbol of nationhood as a flag, or membership in the United Nations. Yet while every nation may now have the capacity to support a supreme court, the total distribution of dispute institutions will still reflect more fundamental qualities of the society. The pinnacle of a judicial hierarchy, after all, is numerically insignificant when compared with the base; and the base of most such hierarchies will continue to be a wide variety of undifferentiated institutions serving families, groups with a quasi-familial structure, and other social subunits. Because of these interrelationships between society and institution, efforts at purposive change in the latter are likely to have little impact on the aggregate distribution of dispute institutions unless accompanied by other, equally radical socal changes, such as have occurred under the influence of technological development, colonialism, or social revolution.

But stability in the total configuration of institutions should not be construed as implying the stability of each constituent institution. Indeed, the contrary is, and must be, true. Overall stability is the result of a composite of those forces which tend to produce high specialization, differentiation, and bureaucrati-

zation, and those which tend to produce low values for these variables. But these dissonant forces do not act disjunctively upon separate institutions; they act conjunctively upon each and every dispute institution in the society. The preceding discussion has identified many such influences: some are cultural values, others inhere in the social structure; some operate directly upon the dispute institution, others exert influence through disputant choice among available processes; some are evolutionary and unconscious, others the result of purposive planning. It is inevitable that there will always be contradictions among these factors, between each and the resultant dispute institution, and within the dispute institution. These contradictions cannot but lead to continuous pressures for change in both dispute institution and society.[358] I can best illustrate this perspective by means of a diagram which consciously reifies the elements of dispute institution and environing society.

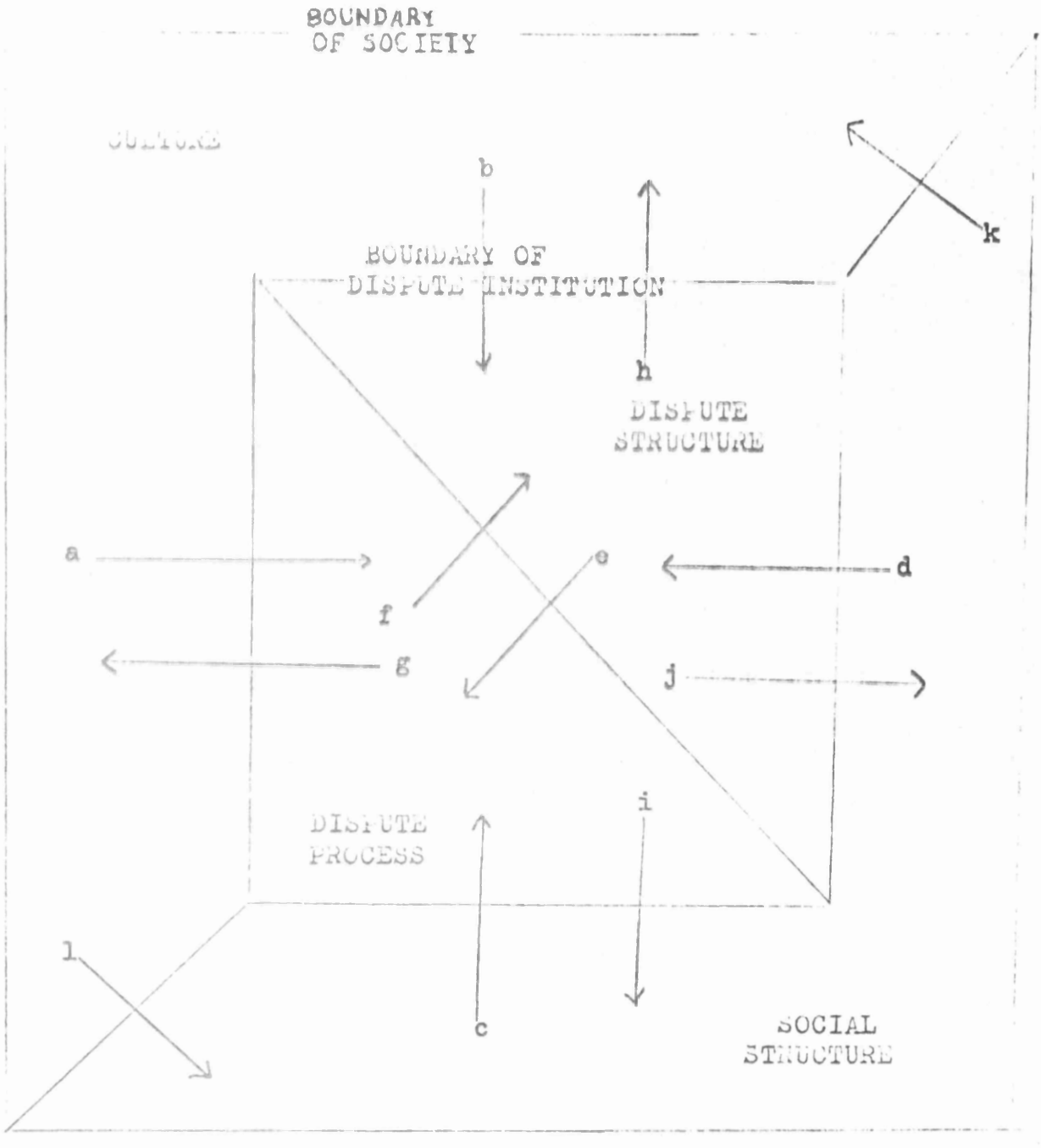


FIGURE 6: A Model for the Analysis of Dispute Institutions in Society

Let us look at the possible consequences of incongruence between these elements (the letter introducing each paragraph refers to the arrow indicating that strain in the model):

(1) Contradictions between society and the dispute institution may produce large scale changes in the institution.

(a) Culture/dispute process, *e.g.*, contemporary western culture attaches great value to the preservation of the marriage relationship; this value may lead to an insistence that any institution which handles disputes involving the relationship engage in a thorough inquiry into the fundamental causes of the dispute.[354]

(b) Culture/dispute structure, *e.g.*, an emphasis on the autonomy of the local unit — especially a unit that contains a homogeneous population which differs significantly from its surroundings — may lead to pressure for the decentralization of dispute institutions, *e.g.*, the police and the courts.[355]

(c) Social structure/dispute process, *e.g.*, the growth of instrumental social relations may lead to a demand for more predictable outcomes;[356] on the other hand, the growth of enduring relationships, especially between large social units like labor unions and major industries, may lead to pressure for a mode of dispute processing closer to arbitration than adjudication.[357]

(d) Social structure/dispute structure, *e.g.*, increases in social stratification will inevitably lead to an increase in the stratification between interveners and the population they serve; yet when coupled with a culture that values social equality, this in turn may lead to pressures to select interveners from unrepresented strata of the society.[358]

(2) The differential impact of social structure and culture on the dispute institution will produce contradictions within that institution which give rise to pressures for small scale institutional adjustments.

(e) Dispute structure/dispute process. Part V of this essay is an exhaustive analysis of the way in which changes in dispute structure can lead to changes in dispute process.

(f) Dispute process/dispute structure. This reciprocal influence clearly occurs, if it is less obvious.[359] The demand for a change in process may lead to pressure for a change in personnel.[360] Disputant pressures for a fuller exploration of the issues may lead to a decrease in the differentiation and bureaucratization of the intervener.[361] Perhaps most dramatically, if the dispute itself is eliminated, as has happened in uncontested

divorces, the dispute institution may be transformed into an administrative agency.[362] Alternatively, what had been an administrative agency — the small claims court, or the lower criminal court — may be transformed into a dispute institution when defendants are represented by counsel who promote their interests aggressively.[363]

(3) Changes in the dispute institution which result from the contradictions just discussed do not, of course, lead to harmony, but to new contradictions, which exert pressure for change in the environing culture and social structure.

(g) Dispute process/culture, *e.g.*, the internal coherence which characterizes the decisional process of some higher appellate courts may be elevated into an ideology as the rule of law, which in turn exerts pressure upon other dispute institutions to conform their behavior to the criteria of procedural due process.[364]

(h) Dispute structure/culture, *e.g.*, qualities of roles within the dispute institution, such as specialization, differentiation, and bureaucratization, become elevated into a value of professionalism.[365]

(i) Dispute process/social structure, *e.g.*, the dispute process will influence the nature of relationships within the society, reinforcing either those that are multiplex, enduring and affective, or those that are single-purpose, transitory, and instrumental.[366]

(j) Dispute structure/social structure, *e.g.*, dispute institutions become more expensive as they are specialized, differentiated, bureaucratized, thus rendering them differentially accessible to a stratified population; this differential access tends to increase that stratification.[367]

(4) Culture and social structure change in different ways in response to these pressures, creating tensions between them.

(k) Social structure/culture, *e.g.*, as social relations are transformed from multiplex, enduring and affective to single-purpose, transitory and instrumental, there is pressure for greater cultural valuation of individualism, self-sufficiency.[368]

(*l*) Culture/social structure, *e.g.*, values derived from the dispute institution, such as professionalism, or the rule of law, become part of the culture, and are generalized to other

institutions; many social relationships approach the model of professional-layman; all authority tends to claim legitimation in terms of general rules.[309]

Nor does the process stop here. Having arrived at new configurations for each of the elements of the model, we find the appearance of new contradictions, which continue the endless pressure for further change.

VII. CONCLUSION

In a sense, then, my analysis has brought us to a conclusion anticipated by both sociology and jurisprudence. Weber observed long ago that "all [authorities] are confronted by the inevitable conflict between an abstract formalism of legal certainty and their desire to realize substantive goals" (1954: 226). And Pound perceived that the result of this tension was a "continual movement in legal history back and forth between justice without law, as it were, and justice according to law" (1922: 54). Yet I hope my analysis has not been entirely redundant. I have tried to show why we cannot eliminate either of these poles, or end the fluctuation between them. More importantly, I have tried to understand why our dispute institutions have the characteristics they do, so that we may shape them according to our values, and thus to some degree influence the society in which we live.

FOOTNOTES

[1] This burgeoning field can be sampled through collections of essays, such as Nader (1965b); Bohannan (1967a); and Nader (1969a); as well as synthetic works such as Nader (1965a); Moore (1970a); Pospisill (1971); Nader and Yngvesson (1973). Many of the above contain extensive biliographies. In addition, *see* Nader, Koch, and Cox (1966).

[2] Two recent sourcebooks surveying the literature are Friedman and Macaulay (1969) and Schwartz and Skolnick (1970).

[3] The anthropological equivalent of what Mills criticized as abstracted empiricism among sociologists (1959: Ch. 3).

[4] The task that Merton urges (1967a) and accomplishes (1967b).

[5] The immaturity of the social theory of law is evidenced in other ways. One is its continued subordination to traditional legal scholarship - from which it still derives its vocabulary. Another is its preoccupation with the selection, definition, and refinement of concepts, of which this article is an example.

[6] This preference inevitably raises the problems of crosscultural comparison. The controversy concerning the possibility of such comparison, and the method by which it should be conducted, is long and passionate. To paraphrase Winch - the problem of understanding another society seems to me no different, in either kind or degree of difficulty, from the problem of understanding another person (1958; 1964: 322-24). Arguments over the means have centered around the choice of a terminology - whether to draw it from the society being studied or from the society of the student, or to develop a logical meta-language independent of both. This, I believe, is one root of the Gluckman-Bohannan controversy — *see* notes 10, 21, *infra*. (Jane Collier has suggested that differences between American cultural and British social anthropology are another source.)

Another problem of this terminological strategy is the tendency of concepts to lose their content as they become more universal (Geertz, 1965: 101). I attempt to meet some of these problems below.

[7] In urging that we try to construct variables that may be scaled continuously, as against those that alternate between polar values, I do not want to be doctrinaire. Dichotomies are often a necessary preliminary in the conceptualization of variation, and may persist as a convenient shorthand thereafter (*see* Part V.B.2).

[8] The discovery that a significant phenomenon, *e.g.*, law, appears to be absent from a society could lead to a search for other phenomena which serve as functional equivalents. Implicit in such a search, however, is the notion of something which the societies have in common, if with substantial variations. I believe it is better to try to formulate the common ground at the outset and then look for the range of variation.

[9] The same difficulty confronts all concepts at a similar level of abstraction - for instance, the family, religion, language, justice.

[10] *See*, for instance, the works cited in note 1. The publication of every major essay and monograph has been met with criticism largely directed toward the choice of concepts, and particularly toward the definition of law. *See, e.g.*, Gluckman's reply to his critics (1967), or Bohannan's reply to his (1968b). Every major conference on legal anthropology seems to get bogged down over this issue. *See e.g.*, Nader, 1969b (report of the Burg Wartenstein conference of 1966).

[11] Bohannan introduced this concept into legal anthropology (1957: 4 ff.). He has since argued that neither the folk nor the analytic models of a given society are appropriate for cross-cultural comparison and that a meta-language must be developed (1969). No one has yet done so.

[12] There is scarcely an anthropologist or lawyer (with the exception of Malinowski, discussed below) who has not adhered to the fundamental thrust of that definition. *See, e.g.*, Hoebel (1954); Pospisil (1958); Gluckman (1955); Elias (1956).

[13] Such a process of concept formation has been advocated by both philosophers and sociologists, even those from opposite schools of thought. *See, e.g.*, Winch (1964: 317-18); Merton (1967d: 143-47); Stinchcombe (1968: 38-40).

[14] Gluckman has observed the same development among other writers (1965a: 181).

[15] Not everyone has accepted the broader perspective. P.P. Howell, an administrative officer with anthropological training working among the Nuer nearly two decades later, could write:

> The term "law" is sometimes used of all processes of social control, and by this definition any of the obligations, customary actions, and conventions inherent in any social system might be described as law. It is less confusing to adopt the hypothesis that the extent of the law is limited to social control which is maintained by organized legal sanctions applied by some form of organized political mechanism. By this definition, the Nuer had no law . . . (1954: 225).

However, Howell could take some satisfaction in the fact that since the time of Evans-Pritchard's fieldwork the British had successfully introduced organized government to the Nuer, thus conferring on them the benefit of law.

[16] Anthropologists are frequently subject to the seductions of negative ethnocentrism. Indeed, it is difficult to survive the anthropological rite *de passage* of up to two years in the field without becoming partially converted to the outlook of the people one is studying. However, in the interdisciplinary field of legal anthropology, anthropologists have tended to borrow the analytic framework of lawyers with practically no exchange in the other direction (Twining, 1968). For an example of a lawyer rejecting the approach of anthropology, *see* Allott (1953). There are several possible reasons for this: law is a highly technical subject possessed of high status in the academic marketplace and a vocabulary incomprehensible to the uninitiated; perhaps as a result many of the anthropologists who ventured upon such uncertain ground have had some training in law, or have collaborated with lawyers (Llewellyn and Hoebel, Malinowski himself, Gluckman, Epstein, Pospisil, S. Moore, D. Metzger). Lawyers, unlike anthropologists, are not so readily attracted to the culture they are studying since they do not generally engage in extensive fieldwork and have no professional aversion to ethnocentrism.

[17] For a thorough discussion of Malinowski's theories of law, as well as a comprehensive bibliography, *see* Schapera (1957a).

[18] Indeed, the positions of the two antagonists are really complementary. This can be suggested by the following list of dichotomous qualities which indicate the opposing emphases.

Radcliffe-Brown	Malinowski
1. negative sanctions	positive sanctions
2. sanctions subsequent to act	sanctions antecedent
3. emphasis on law in the breach	law as observed
4. mandatory law	facilitative law
5. mechanical solidarity	organic solidarity
6. externalized sanctions	internalized sanctions

All societies, of course, fall somewhere between the poles. However, it is unfortunate that Malinowski's viewpoint has generally been slighted in favor of Radcliffe-Brown's.

[19] Malinowski might legitimately reply that he was offering a definition of *primitive* law which obviously does not apply to Anglo-American common law. (I am grateful to Richard Lempert for this observation.) However, even primitive law contains torts, as *Crime and Custom in Savage Society* amply demonstrates. Moreover, we would be left with a definition of law for *all* societies as a class of rules which are not enforced by religious sanctions, goodwill, or an abstract agency; I hardly think this is any more useful.

This over-readiness to generalize all facets of Trobriand society constantly reappears in his writing: "I venture to foretell that wherever careful inquiry be made, symmetry of structure will be found in every savage society, as the indispensable basis of reciprocal obligation" (1926: 25).

[20] Another is Hogbin (1961), with an introduction by Malinowski (1961).

[21] On Gluckman's side, *see* 1955; 1962; 1965a; 1965c; 1967; 1969; and Allott, Epstein and Gluckman (1969). On Bohannan's side, *see* 1957; 1965; 1967b; 1968a; 1968b; 1969.

Others have chimed in (*see, e.g.*, the bibliography in Gluckman, 1967: 417). According to Laura Nader, the Burg Wartenstein conference in 1966 resolved this issue:

> The question of anthropological use of jurisprudential terminology basic to an earlier disagreement between Max Gluckman and Paul Bohannan, was discussed and summarized at this conference. Intellectual agreement between Bohannan and Gluckman was arrived at by Professor Hoebel's skillful statement of the question . . . and the group expressed the belief that the argument had now been dissolved and need no longer occupy the attention and energies of scholars interested in law (1969b: 4).

A reading of the exchanges between the principal adversaries, contained in the same volume, suggests that the resolution was not so successful.

[22] So have Mair (1962: 19) and Goldschmidt (1967: 2-3). Some political scientists have recently set a salutary example by resolving to put aside, at least for the moment, their equivalent shibboleth, "the state." See, *e.g.*, Easton (1953: 108); Swartz, Turner and Tuden (1966); *but see* Fried (1967: 1, 227).

[23] Aubert notes that it is one of the few meeting places between the sociology and anthropology of law (1969a: 12).

[24] Impact studies - which explore the relationship between norms and behavior - have been a mainstay of American legal sociology. They have been conspicuously absent in legal anthropology in general, and in Africa in particular. The reason may be related to policies of indirect rule (*see* note 28 *infra*.) under which some colonial regimes maintained traditional substantive rules. Where independent governments have enacted legislation mandating radical behavioral reform, the reaction of most western scholars has been skepticism. Arthur Schiller quite early coined the phrase "fantasy law" (1965), and most writers appear to agree with him (Verhelst, 1963; Fisher, 1971).

[25] Under the title of "judicial process" this has, of course, been a favorite starting point for lawyers speculating about the law. But these speculations, though dressed in social scientific language, have only been supported by theory and empirical research in the last decade. *See, e.g.*, Kalven and Zeisel (1966).

[26] Legal realism appears to have had considerable influence upon the development of legal anthropology. Karl Llewellyn, certainly a leader of that movement, was also co-author of one of the first substantial monographs devoted entirely to law (Llewellyn and Hoebel, 1941). But there were other reasons as well. Anthropology in the 1950's and 1960's - when interest first turned towards law - was ripe for such a focus. The study of social structure and especially kinship relations, which derived from Radcliffe-Brown and which might have led legal anthropologists to emphasize substantive rules, seemed to have reached a point of diminishing returns. The watchword of the past decade has been process, as explored by the extended-case method (A.L. Epstein, 1967a; 1967b). Gluckman's writings and the work of his pupils - a force sufficiently potent to be termed the Manchester "School" - has carried this approach to such disparate subjects as ritual and symbolism, politices, and law. The relationship may be even more direct. Gluckman's first major work in legal anthropology (1955) was clearly modelled upon Cardozo (1921). It may be significant that the growth of legal anthropology coincided with the rise of Americans to increasing prominence in international anthropology following the Second World War. American social scientists interested in law can hardly escape the reach of legal realism. See, for instance, the substantial reliance by Lloyd Fallers (1969) on Edward Levi (1948). English and continental scholars, on the other hand, may be partial to a more rule-oriented jurisprudence, as were those rare American anthropologists whose interest in law antedated legal realism (*e.g.*, Barton, 1919).

[27] The legal realists were fully aware of this; and offered their own explanations (*e.g.*, Frank, 1931; Arnold, 1935). Aubert has noted it recently (1969a: 13); so must any lawyer or social scientist who seeks to engage in interdisciplinary work. Whatever the reasons for the sentiment, it helps to explain why, after more than fifty years, legal realism remains a program, to be discovered and proclaimed anew by every generation of students, rather than an accomplishment.

[28] It is interesting to note that scholars from France and Belgium, whose colonial policies tended more toward direct rule, showed considerably less interest in indigenous societies generally, and in indigenous judicial institutions in particular. On the other hand, they were more interested in the substantive legal rules of those societies, since colonial officials were expected to administer them. *See* Salacuse (1969).

[29] Innumerable colonial administrators produced admirable studies of such institutions. In Africa *see, e.g.*, Lambert (1947), Phillips (1945); in India *see, e.g.*, Rattigan (1953). Henry Morris (1970: 16) suggests that the interest of colonial officials in traditional judicial institutions was stimulated by a recognition that they offered the best source of information about the indigenous populations which those officials sought to control.

[30] This seems the counterpart, perhaps even a reflection, of the nostalgia for a vanishing social order which attracted the attention, and sympathies, of the classical nineteenth century social theorists (*see* Nisbet, 1966).

[31] Margaret Mead, in her recent autobiography, indicates this was the reason why she became an anthropologist (1972: 291 ff.).

[32] I see no reason why the analytic scheme I develop could not be applied to disputes between groups. For the sake of simplicity, however, I shall speak of the disputants as though they were individuals.

[33] I am here distinguishing conflicts of interest from controversies over ascertainable fact and conflicts over values (*see* Aubert, 1963a).

[34] It is thus sufficient for a dispute that the inconsistency be asserted. I am thereby including both what Simmel termed realistic and what he termed unrealistic conflict (1955). I have deliberately chosen an objective definition in terms of observable behavior so as to avoid the necessity of having to plumb the actual mental states of the claimants. The assertion of a claim need not be verbal. One response to the dispute, of course, may be to persuade the claimants that the inconsistency does not exist.

Even this definition retains a grey area in which each claimant communicates his claim to a different person (for instance, his wife), and no further confrontation develops. Hence dispute is a concept of which there can be more or less.

[35] I am following Gluckman's helpful reminder about the multi-vocality of our more common concepts, and the desirability of developing our existing vocabulary of similar words in order to stress certain elements of a concept (1962: 19 ff.; 1965b).

[36] The stage of conflict, as I have defined it, appears to require a subjective mental element in the definition of the phenomenon. It therefore seems more amenable to psychological inquiry, whereas dispute lends itself to sociological analysis.

[37] This term was suggested to me by William Felstiner.

[38] These concepts have been almost inescapable in the literature of legal anthropology and sociology. There is, of course, a *Journal of Conflict Resolution*. Recent collections in these fields have used those concepts as organizing principles. *See* Aubert (1969b: Ch. 4); Nader (1969b); Gulliver (1969a). Bohannan, who eschews the term in his collection, *Law and Warfare; studies in the anthropology of conflict* (1967), offers a possible reason for this bias in his preface:

> In Western society — and perhaps in most others, but that is beside our immediate point — conflict is unequivocally "a bad thing." It is typical that Western society tends to moralize about bad things — and, having salved its collective conscience, do nothing else (Id. at xi.).

It may be that we are now beginning to come to terms with this fear.

[39] *See, e.g.*, Driberg (1934); Holleman (1950). Lawyers have made the same observation, *e.g.*, Elias (1956), as have colonial administrators, *e.g.*, Dundas (1915).

[40] For a recent criticism of this approach, see Tanner (1970).

[41] Anthropologists also appear to have confused native rationalizations of behavior with objective description. Holleman quotes the Hera proverb: "'To disturb water is to make it calm again' . . . it is sometimes necessary to face trouble in order to get things straightened out" (1952:36). But a reading of the dispute in which this proverb is invoked leads me to conclude that the trouble was by no means straightened out. Nader, similarly, has entitled an essay: "Styles of Court Procedure: To Make the Balance" (1969c), translating the Zapotec value of "hacer el balance." Yet a close study of the five cases she analyzes again leaves me with the feling that no balance was achieved in fact, and the disputes continued to simmer on.

[42] This is obvious, in a crude form, to anyone who has practiced in American trial courts. Lawrence Friedman is engaged in a careful study to document the extent to which it is so, and to explain why.

[43] This lends support to Marc Galanter's important suggestion that legal categories may not be useful starting points for organizing social research (1973: 16).

[44] I have relied heavily on Dahrendorf's analysis of this concept (1968a).

[45] This is one reason why police so dislike intervening in marital disputes — behavior appears to be random, and they cannot know what to expect. The training of a specialized Family Crisis Intervention Unit can be seen as an attempt to institutionalize these disputes (Bard, 1970). An example of highly successful institutionalization is the development of machinery for, and patterns of, labor disputes during the last century (Dahrendorf, 1959: Ch. 7).

[46] My model here is an analysis of the origins of disputes (Mack and Snyder, 1957).

[47] Compare Dahrendorf's definition (1959: 209).

[48] Michael Saltman has conducted a carefully controlled comparison of the content of disputes in three Kipsigis communities in Kenya, which differ primarily in the extent to which their economic organization has been affected by contacts with the larger society. He found that increasing modernization is closely correlated with a shift in the objects of dispute from cattle to land to money (1971).

[49] *See, e.g.*, LeVine (1960) (comparison of Gusii of Kenya and Nuer of Sudan); *see generally* Mead (1961). For examples of societies which appear to encourage such repression, *see, e.g.*, Thubten and Turnbull (1968) (Tibet); Marshall (1961) (!Kung Bushman of Kalahari Desert, South Africa).

[50] *See, e.g.*, Gulliver, 1955; for a general discussion of the alternatives to dispute, *see* Fürer-Haimendorf (1967) (a comparison of several Asian societies). Up to a point, this alternative becomes less available as population density increases. But with the quantum jump to an urban setting migration — whether physical or simply social withdrawal — becomes an important, perhaps even the most important, solution to conflict. Collier clearly delineates the consequences for Zinacanteco conflict of the proximity of the town of San Cristobal (1973).

[51] The eschatological beliefs of many versions of Christianity encourage this approach.

[52] Lon Fuller has emphasized the fact that a *party* initiates the dispute process by asserting his claim; he sees this as one of the essential features of adjudication, which differentiates it from other kinds of processes, such as economic negotiation and political election (n.d.: 54). I find this observation valuable in suggesting the identity of the initiator of a dispute as a variable, and in drawing attention to the possibility that a non-party may initiate. However, I believe the effort to establish ideal types of process to be misguided, and the normative overtones of labelling one of these "adjudication" to be fundamentally antiscientific.

[53] The numerous sociological studies of the legal profession point to the importance of this variable. *See, e.g.*, those collected in Aubert (1969b), or *Lawyers in Developing Societies*, with particular reference to India (1968-69).

[54] This has been one of the theoretical foci of the Berkeley Comparative Village Law Project (*see* Yngvesson, 1971: 4), as is amply demonstrated by many of the studies produced by members of the project (e.g., Nader, 1965c; Starr, 1969; Yngvesson, 1970).

[55] See also Yngvesson (n.d.). This contrast between styles can only be used with the caution that we make explicit whether we are using folk definitions of what is superficial or fundamental, or analytic definitions. I suspect that it would be very difficult to construct the latter.

[56] Lon Fuller argues that bicentric and polycentric disputes are different in kind, and that only the former is appropriate for adjudication (n.d.: 74); see also Howard (1969: 347).

[57] Although I believe that Aubert's perception is well founded and useful, I am not sure that his use of the adjectives "legal" and "scientific" to describe the two approaches is justified. From my own experience of the process of family disputes in American courts, I would argue that lawyers and other legal professionals (judges, clerks, social workers) take what Aubert calls a scientific approach, and the parties, and their non-professional relatives, friends and supporters, follow what he calls a legal approach.

[58] Eckoff (1969); Gulliver (1969a: 18-19). Lloyd Fallers devotes much of the analysis in his book to the problem of explicitness of normative argument (1969). Lon Fuller asserts that *explicit* normative argument is another identifying characteristic of adjudication (n.d.: 69); *see also* Howard (1969: 349).

[59] Students of African law have been struck by the contrasting attitudes of African and English tribunals towards the importance of finality, and the tendency of that value to be emphasized with the Europeanization of the court structure. *See, e.g.*, Lambert (1947: 8); A. L. Epstein (1952: 8); *see also* Howard (1969: 354).

[60] Aubert (1963a); Cohn (1967: 156); Nader (1969c: 88). I believe Nader is in error in contrasting a zero-sum game with the minimax principle. The latter applies equally in zero-sum games. I think the contrast she identifies is one between dichotomous either/or decisions, and compromise decisions. The former is extremely rare in any legal system.

[61] The growing sociological literature of "impact studies" deals with this problem. *See, e.g.*, Nagel (1971).

[62] The problem with using such analyses for sociological purposes is, of course, that both Fuller and Wechsler are offering normative judgments, not descriptive statements.

[63] This convergence may be due to the fact that the "rule of law" is a central concept in the American legal and political folk systems. The work of Philip Selznick and his associates at the Center for the Study of Law and Society, at Berkeley, consists in part of an attempt to give this folk system a definite analytic content. But the difficulty with such borrowings is that the folk concept can never be completely freed of the freight of emotional and ideological connotation which is an essential attribute of everyday language.

This approach also appears to be predicated on a causal sequence which is the reverse of that commonly used by the sociologists and anthropologists surveyed above (with the possible exception of Bohannan). They, by and large, examine the structure of a dispute to understand how it determines process. The neo-natural law school studies the way in which a concept of the dispute process determines its structure. See the controversy between Selznick and his critics reproduced in Friedman and Macaulay (1969: 1-34). For a recent example of this natural law approach, *see* Selznick (1969); *and see Golding* (1969).

[64] This may explain the vehement, and almost uniform, criticism of judicial behaviorism by legal scholars, who disparaged it as "the break-fast school of jurisprudence."

[65] The consequences of the paradigm extend beyond scholarship to the world of action. Legal scholars who embrace the notion of the rule of law urge that judicial institutions abstain from action where norms, or certain kinds of norms, do not decide the dispute. And judges, equally anxious to avoid the taint of non-normative influence, often follow their advice.

[66] I am here concerned with what it *means* for a norm to govern a dispute. Later I will consider the conditions necessary for a norm to govern a dispute.

[67] To ask the question — when do norms determine the outcome of a dispute — is of course to choose a level of analysis at which norms are the significant variable. Recent political science and legal history have preferred to treat other variables as determinative of norms and outcomes. *See e.g.*, Hurst (1964); Friedman (1965); Macaulay (1966); Tushnet (1972); Horwitz (1973).

[68] Wechsler would almost certainly agree, and reply that his statement is meant to be critical and not descriptive.

[69] This is, of course, the criticism offered by Jan Deutsch.

> Adequate generality in a judicial decision — neutrality, if you will — is, therefore, that degree of generality perceived as adequate by the very society that imposes the requirement of adequate generality to begin with . . . (1968: 195).

[70] It would of course be possible, after the dispute, to review events and find some norms which appear to describe what happened — *e.g.*, plaintiffs wearing striped ties should win cases on November 7, 1972 — and this is, to a large extent, what legal professionals (including scholars) do. But this is not what they mean by norms governing disputes.

[71] A norm, in this sense, may be simply the generalization of the demand beyond the fact situation of the instant dispute to some inclusive fact situation, to which positive value is attributed. Children below a certain age may not be able to proceed beyond "I want." But the capacity to verbalize a demand is very soon followed by the capacity to justify it: "I want because I like." And although absolute power may lead a man to regress to infantile demands, as Camus suggests of Caligula, anything less does not have that result; nations are constantly appealing to norms, and so are dictators.

[72] Gluckman had anticipated this by interpreting Gulliver's Arusha cases as displaying the presence and influence of powerful norms (1965c).

[73] This distinction has been criticized by others, *e.g.*, Raz (1972), and further refined by Dworkin (1972). For an attempt to reconcile the two, *see Yale Law Journal* [Note] (1972).

[74] The most noteworthy instance in which a standard became a rule, and then a standard again, is the "stop-look-and-listen" cases. The common law norm of behavior at level railroad crossings had been reasonable care. In *Baltimore & Ohio Ry. v. Goodman* (1927), Justice Holmes sought to "lay down a standard [sic — a rule in this context] once for all" — a rule which would require the driver of a car to stop, look and listen before proceeding through a level railroad crossing, and if his view was obstructed, to get out of the car. This rule had operated for only seven years when Justice Cardozo felt compelled to overrule it in *Pokora v. Wabash Ry.* (1934), writing: "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law."

Recently we have seen numerous instances of standards being construed in an increasingly rule-like manner, *e.g.*, the Equal Protection Clause as applied to school desegregation, to reapportionment, and, as interpreted by state courts, to school financing. At the same time, there are probably a greater number of examples of rules becoming standards: precise grounds for divorce interpreted as equivalent to marriage breakdown; rules governing commercial transactions becoming standards of accepted business practice.

A more interesting question, therefore, is why a particular normative idea is formulated as a rule, or as a standard, and when it will be transformed from one into the other.

[75] A. L. Epstein observed an increase in the level of abstraction of the norms invoked by courts on the Copperbelt over the course of time (1951: 34). Kawashima uses the Parsonian pattern variable — particularity/universality — to describe changing patterns in legal reasoning in Japan (1963).

[76] An increase in explicit argument might, for instance, be correlated with rapid social change, with an increase in cultural heterogeneity or with an increasing reliance on rational authority rather than traditional or charismatic.

[77] Both Tanner (1970) and Collier (1973) emphasize this variable; it may be significant that both worked in societies that had been pluralist for a long time (Indonesia), and had a long history of colonialism (Indonesia and Mexico).

[78] It may be, for instance, that every dispute process requires elements of both flexibility and fixity, so that when substantive norms become fixed, procedures become more flexible, and vice versa. Eckhoff notes that flexibility of norms may inhere in political ideology in much the same way as formality of procedure is mandated by the western concept of the rule of law. "[Confucius'] teaching that the parties tending to assert their rights must be dampened, so that one could get them to compromise, has left deep marks in the East-Asiatic ideology of conflict-resolution" (1969: 173 n.1).

[79] Simon Roberts has given us an excellent analysis of the extent to which traditional Kgatla law is presently open to new norms, often drawn from western legal systems (1971).

[80] Nader has made this explicit (1969c: 88), as has Marc Galanter (1972b). Eckhoff notes that the influence of norms can derive from a wide variety of sources, such as political power, tradition, ethics, etc. (1969: 176-77), and further that the same individual may alternate between adjudication and mediation in coping with a dispute, even though his quantum of authority does not change (1969: 180-81). Weber, of course, has conducted the most extensive inquiry into the relation between the nature of authority and the nature of norms (1954).

The tendency of the concepts I seek to correlate to merge into an indivisible unity becomes acute at this point, and the causal direction of their relationship becomes obscure. Do authority or the relevant norms antedate the dispute; do they arise as a result of the dispute? The problem is that both statements are true, and the attempt to explain one by the other is necessarily arbitrary to some degree.

[81] This may be considered a special case of Weber's concept of charismatic authority.

[82] This is an instance of Weber's concept of traditional authority.

[83] Eckhoff gives the example of chess-players (1969: 177); Piaget finds similar instances among children (1965: Ch. 1), and Malinowski among the Trobriand Islanders (1926: 12 and *passim*). We can all think of examples from our own experience. This may be generalized as Weber's concept of rational authority.

[84] Many authoritative decision-makers function largely without reference to norms. Weber's ideal-type of *kadi* justice (1954: 63) and Maine's picture of the paterfamilias issuing *themistes* (1950: Ch. 1) may be examples. Even those decision-makers whose behavior can, in some degree, be explained by norms engage in considerable activity which cannot be so explained.

[85] Compare Tanner (1970), and Collier's use (1973) of Barkun's definition of law (1968: 92, 151). Marshall and May put this nicely in their study of the divorce court in Ohio:

> The substantive law of divorce is merely the terrain on which the battle of the divorce court is waged. As a manual for the training of American infantry officers says,
>
> > The terrain exercises a controlling influence on all military operations. Properly utilized it is frequently the decisive factor. The elements of the terain are the concealment, cover, facilities for movement, and opportunities for observation and fire which it affords, and the obstacles it interposes to fire and movement.
>
> The procedural rules in divorce actions are, therefore, what a military strategist would call "the utilization of the terrain" (1933: 211).

[86] This is, of course, a commonplace among practicing lawyers. Indeed, there are manuals which instruct the practitioner in how to control for jury prejudice (Garry, 1969). But if the legal system does not actively seek to conceal the irrationality of the jury, it is sufficiently ambivalent about that factor to resist academic investigation and publicity. *See* Strodtbeck (1962: 151 n. 8).

[87] *See, e.g.*, R. Dawson (1969); Hood (1962); Frankel (1973); Seymour (1973). Most criminal dispositional systems, in addition, make explicit provision for the exercise of executive clemency, which is intentionally a deviation from the norms. There is considerable uncertainty over the extent to which norms do, and should, govern this behavior, as the recent Watergate scandal indicates.

[88] The discretion allowed private individuals in initiating civil litigation is so obvous that, unfortunately, it has never been studied; von Jhering is almost unique in his speculations (1915). *See also* Black (1973). This has, however, formed a principal concern of the sociology of criminal law. *See, e.g.*, J. Goldstein (1960); Skolnick (1966); LaFave (1965); Black (1971).

[89] *See* Miller (1969). Compare the criticism of Adam Walinsky, then candidate for New York State Attorney General, when he announced that if elected he would not devote his primary efforts to the prosecution of flag burners (*New York Times*, August 15, 1970; August 21, 1970), with the claim by the then Attorney General Louis Lefkowitz (who was seeking re-election) that he prosecuted all offenses brought to his attention. Whenever such discretion is made explicit there are cries of outrage. See the attempt by referendum in Berkeley to regulate the discretion of the police to make arrests for the possession of marijuana. Although the referendum was successful, it has since been declared unconstitutional by a court. The Watergate scandal is in part a controversy over the factors that should affect the decision to prosecute.

[90] Newman (1966); Howard (1969); Jones (1969); Ross (1970). My own experience in practice in New Haven confirms these observations. Not only does the judge accept uncritically almost any agreement between counsel, but he will frequently refuse to hear counsel argue when they wish to do so, and instead send them out of the courtroom to negotiate a settlement.

[91] The controversy stimulated by President Nixon's recent successful and unsuccessful nominations to the Supreme Court, and by the change in judicial ideology and decision which those appointments have produced, is contemporary evidence of the importance of these factors.

[92] O'Gorman (1963: 21), following Merton (1967b: 126 ff.), has argued that such disparities between norm and behavior should provide a stimulus for social analysis, not just moral reprobation: "Norms, legal or otherwise, are not evaded without reason. When evasion becomes common practice among large numbers of law-abiding citizens, the determinants of such evasion are to be found . . . in institutional inconsistencies rather than in individual morality. . . . patterns of evasive behavior have developed by which the law is obeyed in theory and denied in fact. To paraphrase Merton's analysis of political machines, the functional deficiencies of the law generate an alternative method to fulfill social demands somewhat more effectively."

[93] *E.g.*, the scandal concerning Justice Mitchell Schweitzer (*New York Times*, August 3, 4, 6, 7, 14, 1971).

[94] The O.E.O. Legal Services program was developed largely in response to a recognition of these disparities, and the literature which led to its creation, and which evaluates its success, is replete with data. *See, e.g.*, *Harvard Law Review* [Note] (1967); Galanter (1972b).

[95] Gusfield deals at some length with the problem of explaining behavior, which is explicitly justified in normative terms, by means of other social factors (1963: 57-60).

[96] Aubert has noted that "a touchiness often arises because of a certain ambivalence in the foundation of the relationship. Lawyers are the subject of sociologists, but they are simultaneously collaborators . . ." (1969a: 13-14).

[97] O'Gorman's study (1963) of lawyers who handle matrimonial cases offers excellent insights into the complementary influence of official rules, and of other structural and cultural factors, upon the behavior of each of the actors in those cases. Throughout the book he presents instances of behavior which cannot be explained by official norms alone. For instance, the decision by a resident of New York to seek his divorce in another jurisdiction, is best explained by the socio-economic status of the petitioner, and by the nature of his lawyer's practice (1963: 77-80).

[98] *See* Stinchcombe's analysis of the use of type concepts (1968: 43-47).

[99] Malinowski, of course, is the extreme example of this. But many anthropologists have difficulty breaking out of the framework of the first society they study — which is often the last.

[100] It is striking that anthropologists who engage in extensive fieldwork in tribal societies often fail to carry out comparable research in their own. Instead, they rely on popular literature, or even the anecdotal experiences of themselves or their friends. *See, e.g.*, Bohannan (1970). On the other hand, practicing lawyers — certainly participant observers of their own legal system — make the opposite mistake.

[101] Yet even it reveals the dangers of this method. Jane Collier's attempt to apply the Zapotec model to her Zinacantan material seems to me to distort the latter, not to illuminate it (1973: 105-6).

[102] An interesting example of a zero-sum game which included some of the features of Nader's model, but not others, was experiment of a history department in an American university in allocating by vote the total sum of money available for faculty raises for the entire department among each of its members. The focus of inquiry tended to be prospective rather than retrospective, but discussion was limited to superficial issues.

[103] On the other hand, the Bakongo explore all the issues, and yet have no belief in the value of compromise, or the impossibility of an unambiguous attribution of praise or blame (MacGaffey, 1970: 183).

[104] American courts impose compromise all the time (see Coons, 1964). Every jury verdict in a negligence case is a compromise between the victim's claims and the defendant's contentions.

[105] I would suggest, as a hypothesis, that such a departure might be found where the Zapotec court was confronted with a dispute which contained a suspicion of witchcraft; I would be very surprised if such a suspicion was made public, and openly and fully explored.

[106] Weber, himself, would choose another course. He would seek further insight from the departure of data from ideal type (1968: 506). Brodbeck has criticized this approach as circular (1968: 459-60).

[107] This is another reason why I reject the attempt to divide disputes into normative and non-normative, a division which creates two ideal types.

[108] One reason why anthropology has not proceeded much beyond the classification of traits may be the insidious influence of functionalism. If, as Malinowski in particular proclaimed, everything in a society is related to everything else, the only possible explanation is a holistic description. This was undoubtedly a fruitful doctrine in the early study of tribal society, and a valuable caution for those who would blindly study single traits in isolation. But taken to its logical extreme, it leads to a mindless gathering of data in the vain hope of understanding the society as a whole.

[109] Nadel (1951:407). Much of the work of the culture and personality school of American anthropology is vitiated by the failure to use separate indices for culture and personality. James Gibbs commits the same error in his recent study of the dispute process among the Kpelle, but he is clearly conscious of the problem and has conducted, though not yet analyzed, a separate inquiry into personality traits (1969: 185).

[110] This has also been called the "Zanzibar syndrome" in a probably apocryphal story about a Zanzibari student at Yale who confounded his professor by demurring to every generalization offered on the ground that it did not apply to Zanzibar. Of course, he was right — Zanzibar is special — but so is every other concrete instance.

[111] For critical discussions of the definitional problems, *see* Dahrendorf (1968a); Southall (1959).

[112] The Supreme Court's decision in *Brown v. Bd. of Educ.* (1954) may not have been "effective" to integrate the schools, but it contributed in some degree to later legislation which asserted the principle of desegregation in other social activities.

[113] At least this was the hope of the numerous colonial administrators who recommended that remedy. *See* Phillips (1945: 168).

[114] Kenya has consciously adopted a policy of stationing judges outside their localities in order to promote the development of national norms.

[115] An excellent example of sophisticated analysis of this more complex relationship is Aubert (1966).

[116] Even in this somewhat more sophisticated form, my essay is still an "impact study." Among the many reasons why that format is so pervasive in the sociology of law, two predominate. First, contemporary western politics is built on an assumption that law should be effective. Second, all scholars are swayed by their value preferences in choosing problems for study. Because these are often unstated, they are rarely subjected to analysis. In those circumstances, official statements of value — embodied in law — offer a convenient and acceptable starting point. I have discussed this point at greater length in a review essay (1973).

[117] I have done so to a limited extent elsewhere (1970), and am in the process of expanding that analysis.

[118] Each of these defining criteria allows of variation, so that the dispute with an intervener merges imperceptibly with the dispute which lacks one. Thus the intervener need not be addressed directly by the parties, but may hear of their claims through intermediaries. And he need not issue a unilateral decision; indeed, inaction may be a form of intervention if action is customary.

[119] It appears to be a norm of almost universal provenance that someone, at least, should intervene in every dispute. This may explain the widespread repugnance expressed when *no one* does so, whether in New York City — as in the Kitty Genovese incident — or in Uganda, among the Ik, as described by Colin Turnbull (1972). New Yorkers have recently taken heart from the renewed willingness of their fellow citizens to intervene. *See, e.g., New York Times*, July 23, 1973, p. 1.

[120] The relative capacity to do something about the role may explain why so much sociological attention has focussed on the legal professional, whether lawyer or judge, and so little on the litigant, whether actual or potential.

[121] Among the numerous examples are: Kenya — Abel (1969a; n.d.b); Uganda — Russell (1971); Zambia — Spalding, Hoover and Piper (1970), and the extensive references cited therein.

[122] There are several problems with this definition. How do we know whether a disputant is following the decision of an intervener? If we use an objective criterion — conduct which appears to an external observer to be in conformity with the decision — we include conduct which is merely fortuitously conformable. *See* Weber (1947: Ch. 1). On the other hand, a subjective definition introduces all the problems of measurement and proof. Furthermore it creates a circularity of definition: authority is measured by conformity, and conformity by submission to authority.

[123] Pospisil's purpose here is to distinguish law from custom. He does not explain why he chooses these two qualities, nor how they are related to each other, if they are.

[124] *See Durham v. United States* (1954). It is possible that psychiatrists, habituated to the exercise of absolute authority, come to behave in a more legalistic fashion, *e.g.*, in determining commitment to or release from large state mental institutions, or in deciding to grant or deny parole. *Cf.* A. Goldstein (1967). Aubert makes a similar point (1936b: 19).

[125] The enthusiasm with which American foundations poured money into higher education in general, and legal education in particular, in Africa and Latin America, is testimony to the pervasive belief in the capacity of training, even at a relatively late stage of a person's intellectual career, to effect change in him and in society. The results have not met the expectations.

[126] By including authority and training under this umbrella, I do not mean to suggest that role differentiation captures all that is significant about those two concepts; rather, it abstracts their bare bones. I am here concerned whether the intervener possesses more authority or training than other interveners, not with the content of that authority or training. The latter will undoubtedly also influence the intervener to act in certain ways.

[127] *See, e.g.*, Toennies (1957); Sorokin (1937-41). Here, as in my analysis of process, I reject the typological approach but use the types posited to furnish variables.

[128] In anthropology, *e.g.*, White (1959); Steward (1955); Sahlins and Service (1960); Fried (1967). In sociology, *e.g.*, Parsons (1966); Eisenstadt (1964). For additional references, see my bibliography on "Evolutionary Theories of Law in Society" (n.d.a: -11).

[129] *See also* Schwartz and Miller (1964); Nagel (1962). Lubman has used the same variable to explain the differences in functioning among urban, industrial, and rural mediators in contemporary China (1967: 1330, 1337).

[130] I am compelled to accept Robert Nisbet's contention that much of twentieth century sociology is a reworking of the ideas of nineteenth century ancestors (1966: *passim*).

[131] The task itself is somewhat dauting. The available material on Kenya, published and unpublished, is considerable. *See* Abel (1969b). In addition, I collected cases, disputes processed out of court, descriptions of and prescriptions for courts by administrative officers, and statistics about litigation.

[132] Yet my purpose has not been an exhaustive survey and synthesis of the growing literature on dispute settlement. I am seeking, rather, to elaborate some general theories in such a way that they can be tested. I think the reader who continues with this essay will agree that I have derived more than enough concrete conclusions for this purpose; further proliferation of examples would be unproductive at this stage, since they would not offer evidence for or against the theory. The one bias that may prove serious is my familiarity with Anglo-American legal systems, and my ignorance of their Continental counterparts.

[133] It may well be that our own society is the best place to test many of the hypotheses formulated by means of research in the developing countries. Not only are some of the ethical problems of research and experimentation mitigated, but controlled reform may be more practicable than in societies where rapid social change is a paramount objective.

[134] Functional specialization, in the sense of role independence, variable 52 *infra*, has strong normative overtones as well. The separation of powers is an axiom of the political ideology of western Europe and America. European observers invariably noted the commingling of powers in African polities, and generally criticized it. Colonial governments often made an attempt to restructure African governments along European lines. *See, e.g.*, the "Bushe" Report (1934); Spalding, Hoover and Piper (1970: 59-69). But these attempts have been of only limited success, even today. Fallers writes that Soga chiefs, who participated in promulgating legislation and administering the affairs of government, were also the courts until 1941, and continued to dominate the judiciary at the time of his fieldwork in 1950 (1969: 59). Indeed, in a case heard in 1950, the defendant seemed wholly ignorant of the distinction between a subcounty chief acting in his administrative capacity and the same individual performing the role of judge (1969: 165). (I found instances of similar confusion about the headman's *korti* in Kenya in 1967-68.) But not only did the judges perform other governmental functions, they frequently owed allegiance to persons and groups as a result of their positions in the traditional state structure. Fallers has devoted a whole book to describing the "strain" to which an individual is subjected when he is the focal point of such poorly integrated institutions asserting inconsistent expectations about his behavior (1965).

[135] The definition of what it means to perform a function will clearly cause serious difficulties when we come to measure this variable, and I am grateful to Roberto Unger for pointing them out. What is intervention? Is it sitting in the presence of the disputants? even if the intervener is thinking about something else? What if, despite his efforts, the dispute is stalemated? An intervener may be specialized in the sense that he is physically in his office, but nevertheless be diversified in the functions he performs.

[136] *See* Biddle and Thomas (1966: 34). Compare, for instance, the Continental tradition of a career judiciary (Merryman, 1969: 34 ff.) with the American practice of appointing men to the bench late in life, some of whom (*e.g.*, Supreme Court appointees), while qualified as lawyers, may have had little contact with the law for many years. Contrast with both of these the situation in some traditional African societies, where men may qualify to adjudicate by attaining a senior age-grade, prior to which point they have performed that function only within their families, if at all. *See, e.g.*, Lambert (1956: 107 ff.). Given the limited life expectancy, most will function as judges for a very short period, both absolute and relative.

[137] Biddle and Thomas (1966: 59) (concept of repertoire extensiveness).

[138] The combination of roles may be as much the product of conscious decision as the division of roles. In New York's experiment with the Family Crisis Intervention Unit it was decided that those patrolmen who received special training, and responded to *all* family quarrels, would continue their regular patrol work (Bard, 1970). One reason may have been the lower status associated with specialization in that role. A similar reason may explain the uniform opposition of the Connecticut bench to a specialized domestic relations section in place of the present practice of rotating most judges through the domestic relations calendar for a limited period of time.

[139] Again, societies may consciously make the opposite decision, requiring interveners to perform other roles, and the occupants of other roles to intervene. Chinese mediation is an example (Lubman, 1967: 307-08 n. 94).

[140] This can go far beyond provisions designed to prevent a conflict of material interests — *e.g.*, that a judge divest himself of stocks, or recuse himself in a particular case. One response to the Warren Commission's investigation was a demand that judges be precluded from acting in such a capacity in the future. Ironically, the very specialization of judges in the United States contributes to their status, which leads to pressures upon them to accept other roles.

[141] *See, e.g.*, Smelser (1964: 261): "Simply defined, differentiation refers to the evolution from a multi-functional role structure to several more specialized structures."

[142] Merton has demonstrated this convincingly with regard to intermarriage in America (1941).

[143] Compare, for instance, the High Court of England (whose justices constitute .00012% of the population) with the lay magistracy (which constitutes a percentage 300 times larger) or with the mediation committees of China which, even within that much larger population, constitute a percentage 200 times as great. *See* Abel-Smith and Stevens (1969: 459 ff.); Cohen (1966: 1202).

[144] It should not be thought that African dispute institutions lack this form of internal specialization. Akan courts possessed spokesmen, messengers, and criers, as well as chiefly judges (Mensah-Brown, 1970: 128). But the fact that society recognizes such roles does not mean that they are always performed. Ethiopian litigants tended to shun the amateur lawyers who were available (Fisher, 1971: 733).

[145] Spalding, Hoover and Piper see this as an important theme in judicial development in Africa (1970: 52-59).

[146] Tribal courts generally had unlimited subject matter jurisdiction. The change under colonial rule was abrupt. Those that were recognized were hedged in on every side: forbidden to hear cases involving marriages celebrated under certain ordinances, denied statutory jurisdiction, restricted in cases where death had occurred, or where severe penalties might be required. With independence these restrictions have been relaxed. But there is reason to expect an increase in specialization along the lines of recent western judicial history. *See* Abel-Smith and Stevens (1969).

[147] The American doctrines of exhaustion of administrative remedies and abstention by the federal courts are extreme refinements of this. But Chinese judges, too, scrupulously observe the requirement that a couple submit to mediation before the hearing of a contested divorce (Lubman, 1967: 1327-28).

[148] Conversely, social revolution may constitute a conscious attempt to diminish social distance and cultural differentiation, especially as these variables characterize judicial institutions. *See* Lubman's discussion of Maoist strategy as early as 1946 (1967: 1306-09).

[149] I wish to distinguish here between two kinds of peripatetic disputing. In the first, modelled upon some African societies, the intervener accommodates to the dispute, holding the hearing where the disputants, their witnesses, or the objects of the dispute are located. I would view this as relatively undifferentiated. However, Duncan Kennedy has suggested to me that a central government may send out interveners to hear disputes locally in order to enforce its rule more effectively. I would treat this as a situation of high differentiation because the intervener comes from the capital and presumably is endowed with some of the other qualities discussed below. Appeal courts in Kenya travelled on circuit; so did those of Tanzania (Kaplan, 1965: 85).

[150] Lubman notes that Chinese mediators visited the disputants individually in their homes (1967: 1298, 1307).

[151] African dispute institutions accommodated to disputants here, too. Margery Perham notes of Ethiopia: "Parties in civil and even minor criminal disputes would call upon a passerby to decide the issue between them under a tree. These informal roadside courts might last for hours, to the deep interest of the spectators. . . . Judges thus conscripted were expected to accept their duties" (1948: 144-45, quoted in Fisher, 1971: 729). Collier reports instances of the Zinacanteco presidente being awakened at night, or cornered at his home early in the morning (1973: 30). Even after the hearing had been begun, it may be adjourned to permit parties to call missing witnesses (A. L. Epstein, 1954: 16; Holleman, 1952: 30). By contrast, the status of legal specialist — whether lawyer or judge — like that of the medical specialist, is often defined by how many people he has waiting for him, and how long each of them has to wait. An excellent empirical study of the Magistrates' Courts in England observes: "It is certain that the convenience and feelings of litigants have hardly ever been considered in the administration of this branch of summary justice. Such details as the opening hours of collecting offices or the willingness of court staff to save a woman the loss of a half day's earnings by giving her information over the telephone seem too trivial to be considered in legal discussion of the jurisdiction. But these are the sort of trivia that mean for the mostly very poor and unhappy citizens who meet family law in the magistrates' courts, the difference between dignity and humiliation, between decency and squalor." McGregor, Blom-Cooper and Gibson (1971: 122).

Attempts to reform modern legal systems often attack this phenomenon: Chinese mediators and the first American juvenile court both met during leisure hours so that parties would not have to miss work (Lubman, 1967: 1318; Jevenile Court of the City and County of Denver, 1904: 85).

[152] This factor has been unduly neglected, and only a few studies give us any data on, much less analysis of, judicial architecture. *See, e.g.*, Hazard (1962); Bedford (1961); Moley (1932); Collier (1973); Spalding, Hoover and Piper (1970: 161 ff.); Virtue (1956).

[153] An Ibo proverb perfectly expresses one extreme of this variable: "A case forbids no one" (Elias, 1956: 239, quoted in Fisher, 1971: 731). A public setting may permit other members of the community to participate, as in Ethiopia (Fisher, 1971: 732) or Tanzania (Kaplan, 1965: 84).

[154] When Judge Benjamin Lindsey, moving spirit behind the highly innovative Denver Juvenile and Family Relations Court, was replaced by a much more traditional judge, he wrote of his successor: "The bench itself he finds too low to meet the requirements of judicial dignity — according to the press he will 'raise it 18 inches'! And in an expansive moment he confides: 'I will say . . . that my idea of the court is to make it as nearly like other courts of record in the state as it is possible under the law'" (Lindsey and Borcugh, 1931: 296).

We have recently witnessed other developments in the physical environment of American courts which, though introduced for different reasons, appear to have the consequence of further increasing the social distance between intervener and disputants. Dismayed by the amount — and kind — of defendant participation in recent criminal trials, judges have resorted to a variety of devices, one of which — approved by the Supreme Court — has been to remove the defendant from the courtroom and allow him to watch the proceedings by closed circuit television. The same technology has been used in reverse: in order to protect the jury from hearing inadmissible evidence, the trial has been videotaped, cut, and then presented to the jury on television. *See New York Times,* June 23, 1973, p. 32.

155 The difference beween traditional African institutions and those established by colonial rule was immense. Further change has occurred more gradually as a result of administrative consolidation and population growth. Kaplan notes an increase in the size of Chagga chieftaincies between c. 1900 and 1952 from 5,000-15,000 to 10,000-30,000 (1965: 82-83). Prior to the judicial reorganization of 1930 there were approximately 400 primary courts in Kenya serving a population of 4,000,000; in 1970 there were about 100 such courts serving a population of more than 10,000,000, roughly a tenfold increase in the population per court.

156 Maine stressed the importance of a transformation of the concept of jurisdiction from one based on kinship (personal) to one based on territory (geographic) (1950: Ch. 5). Barton found empirical confirmation of this hypothesis in the Philippines (1949).

157 The recognition and definition of limits may also be viewed as a concomitant of bureaucratization (*see* Part V.A.3 *infra.*). Lubman describes the jurisdiction of mediators in industrial settings in China as being very flexible and indefinite (1967: 1333).

158 Henry Morris describes the gradual expansion of the personal jurisdiction of primary courts in Africa — from Africans of the local area, to Africans of the tribe, to Africans of the territory, to all Africans (1970: 14). Since independence there has been a general rejection of the concept of personal jurisdiction, which is seen as repugnant to contemporary ideals of equality and nationalism.

159 The increase in the size of the geographic unit served by the primary courts in Kenya has been more than matched by an improvement in roads and bus transport. *See* Barnett (1965: 44). This is true for much, though not all, of Africa.

160 This consequence of the colonial system of criminal justice was often the subject of concern. *See, e.g.,* the "Bushe" Report (1934: 13-16, 23).

161 That this is often done from very different motives — *e.g.,* to promote a spirit of national unity, or to limit corruption — does not alter the consequences.

162 Marc Galanter tells me that a civil servant in India was expected to resign from his club when appointed a judge. Celibacy may have similar consequences for another profession.

163 The inflexibility of the costs may also be an index of bureaucratization. Holleman indicates that customary gifts made in Hera courts were highly flexible: goods could substitute for cash, partial payment would be accepted as a token of good faith intent to pay the rest, and full payment was often neither demanded nor made (1952: 31).

164 As Fisher describes the criminal investigation in Ethiopia, it was an occasion for feasting by the local officials, and an economic disaster to the inhabitants (1971: 719).

165 I would expect remuneration from another source to result in greater differentiation of the intervener for two reasons: the economic nexus is eliminated, thus permitting the intervener to remain more aloof from the disputants, who no longer pay him for his services; the amount of the remuneration can be greater since it need not come from the disputants alone. With respect to the former difference, compare the legal or medical professional, who avoids discussing payment with his client and sends a bill after the service is rendered, with the storekeeper, who shows no such embarrassment.

[166] Even in the most egalitarian societies, women are commonly excluded from participation in disputes, or relegated to a largely passive role as audience. They are thereby deprived of the training required to perform the role of intervener.

[167] The opposite may also be true; Chinese mediators were frequently illiterate — certainly not by chance (Lubman, 1967: 1323).

[168] I am using this in Weber's sense of "the probability that a command with a given specific content will be obeyed by a given group of persons" (1947: 152). Although authority certainly can serve to differentiate the institution or intervener, I am not clear in my own mind whether its effect is commensurate with that of the other variables, or whether it has consequences that differ in kind.

[169] At the same time that colonial governments recognized certain traditional African dispute institutions, they generally granted them a monopoly of authority to decide disputes, and imposed criminal penalties on other traditional institutions which continued to perform the same function. *See, e.g.*, Native Tribunals Ord., No. 39 of 1930, s. 26 (Kenya); and the description of prosecutions in Meru District in Phillips (1945: 82 ff.).

[170] State monopoly of the power to change status is a very recent phenomenon, and still incomplete even in western countries; consider the history of such statuses as adoption, marriage, and divorce, where "common law" (*i.e.*, private) practices persist. For the change in Africa, *see* A. L. Epstein (1952: 7).

[171] The literature on tribal dispute settlement is replete with instances in which authority is very widely distributed among participants. This variable may be especially useful for comparing dispute institutions in chiefly and acephalous societies.

[172] Dahrendorf sees "the unequal distribution of political authority over persons as incumbents of positions" as the critical element in a meaningful concept of social stratification (1959: 292, and Ch. 8 *passim; see also* 1968b; 1968c).

[173] Efforts are often made to reduce the social distance between interveners and the rest of society, *e.g.*, the requirement that races be represented on a jury in proportion to their representation in the population, or the recent California experiment of having juveniles act as a jury in the juvenile court — presently one of the most extreme instances of social distance between party and intervener, measured in terms of age. Although interveners in African dispute institutions generally were socially proximate to the disputants along most of these variables, they were often socially distant in terms of age and sex, being staffed exclusively by male elders. Yet women and youths might have their own institutions for internal disputes, and some tribes (*e.g.*, the Meru of Kenya) institutionalized the representation of several age grades among the interveners.

[174] Dahrendorf has shown how this can contribute to a distinct social stratum even when the members are originally drawn from quite diverse strata (1964).

[175] Such meetings are beginning to occur among primary court judges in Africa. *See* Kaplan (1965: 85); Georges (1968). English High Court judges have opposed decentralization of the judiciary on the ground that judges situated outside London would be "cut off . . . from the intellectual stimulation of the inns of Court." (Abel-Smith and Stevens, 1969: 289).

[176] The reporting of judicial decisions can serve this function, where there is an effective mechanism for circulating those reports. This is not true in most African nations. In Kenya, for instance, each High Court judge determines whether his decisions shall be made available, and some are apparently reluctant to submit them to the scrutiny of their peers.

[177] Such issues can divide as well as unite the judicial corps (Moriondo, 1969).

[178] The norms regarding proper appearance in a judicial setting appear to be widely disseminated in American society, and finely graded. Youths appearing before the juvenile court are aware that its proceedings are supposed to be informal, and that they can wear street dress for the initial hearing. But they also know that, as they return as multiple offenders, they are treated more harshly and judicially and may be sent to reform school. At this point they cut their hair and put on ties.

[179] The attempt to alter this highly impractical dress in Nigeria met with furious resistance, and was defeated (Cottrell, n.d.). On the other hand, the Zinacanteco presidente, who ordinarily wore Ladino attire, put on Indian dress when he heard cases at the Town Hall (Collier, 1973: 81).

[180] Jane Collier has used an idiom drawn from Goffman to illuminate the behavior occuring during a dispute (1973: Ch. 3). In doing so, she reveals the importance of developing concepts for analyzing the structure underlying such behavior. In the absence of such concepts, there is a real danger that the social theory of law will reduce to mere ideographic description as our interest moves from the analysis of structure to the analysis of process.

[181] At the extreme of non-differentiation, there may be no behavior that is distinctive of the dispute institution. *See* Holleman (1952: 33).

[182] We are accustomed to thinking of judicial deliberations as solemn proceedings. But this is not always true in our own courts *(see* Moley, 1932), and other societies may institutionalize different kinds of behavior, as in the Eskimo song duel (Hoebel, 1954: Ch. 5; *compare* Fisher 1971: 733).

[183] For instance, contrast the behavior of our more notorious trial lawyers in front of a jury with argument before the Supreme Court.

[184] *See, e.g.*, Messenger (1959). Paul Bohannan, a highly skilled fieldworker, wrote of his own difficulties:

> When I first went to Tivland in 1949, I was invited by chiefs and elders to attend court sessions. I soon gave them up. I knew their importance, and knew that they formed a late stage in fieldwork, when my knowledge of language and culture was fuller. Most of my case material, then, comes from my third tour in Tivland, in 1952-53. My own knowledge of the language was such at that time that I could understand most court cases easily as they proceeded. I was never able to understand all of them easily or probably any of them fully, for the Tiv language — like all African languages — is highly allusive and its perfect understanding demands not only a thorough knowledge of its idiom and its myths and stock metaphors, but also of the incidents which have occurred in the specific neighborhood in the last forty or fifty years. (1957: xii).

[185] This mode of differentiation has recently become a source of tension in the American judicial process. See the extensive literature on the Chicago conspiracy trial, *e.g.*, Dellinger (n.d.); Lukas (1970); J. Epstein (1970); *see also* Rosenblum (1971).

[186] The structure of the American courtroom typically insures this. Not only is the judge elevated on a bench, and segregated from lawyers by the bar, but he enters and leaves the courtroom from chambers by means of a door restricted to him alone.

[187] Holleman describes the way in which Hera litigants must "climb up" to the judge, who is physically situated at a higher level, by means of token gifts whose vernacular name means "to climb up" (1952: 28, 30). Lubman quotes a revealing incident in which a Chinese judge and an American diplomat clashed over whether a Chinese employee of the U.S. Consulate, who had been summoned to testify, would kneel in traditional Chinese fashion. Needless to say, the American won (1967: 1296 n. 42). Yet American courts are hardly that different. The Superior Court for New Haven County employs a sheriff for each courtroom whose functions appear to be practically limited to ordering all present to rise at each entry and departure of the judge, and admonishing witnesses not to chew gum, or put their hands in their pockets, or walk in front of the (empty) jury box. And I find it interesting that this mandated deference extends outside the courtroom. An American judge is almost always referred to as "Judge" in social relations outside the court, even after his retirement, sometimes even by his most intimate friends. This is only true of a few other honorific titles, *e.g.*, Senator, General.

[188] Among the Barotse, the king or member of the ruling family is *ex officio* the head of the *kuta*. However, Gluckman writes:

> Usually the ruler does not attend the hearings of cases, though the kuta's judgment is referred to him for confirmation. Even if the ruler chooses to sit in the kuta while a case is being tried, it proceeds as if he were not there. He takes no part in the hearing, and the facts and judgments in the case are referred to him as if he had not heard them (1955: 9).

See also Mensah-Brown (1970: 128) (Akan).

189 Observers of traditional African dispute institutions have often remarked on the eloquence of many participants, which seems to be scarcely less than that of the elders who are hearing the dispute. In American courtrooms, by contrast, the difference between the fluency of the legal professionals and the inarticulateness of parties and witnesses could not be more pronounced. If the records of local court cases in Kenya are a fair rendering of the actual interchange, litigants have become more tongue-tied as these courts have evolved toward a European model. When offered an opportunity to cross-examine an adversary or hostile witness, parties often express an inability to do so. The judge then takes over the task—usually with considerable skill.

190 This is in part an academic euphemism for the concept of "professionalization." The latter is frequently demanded today as a solution to almost any imaginable misbehavior—compare the schemes for professionalization of the police with those for the professionalization of various forms of psychotheraphy. Professionalization has also been a constant theme elsewhere (Spalding, Hoover & Piper, 1970: 36-52).

191 As noted above, a quality that is apparently achieved may in fact be restricted to an ascribed group if the educational or experiental prerequisites are not generally available.

192 The notion of the complete "autonomy" of the judiciary was successfully championed by the Italian Associzione Nazionale Magistrati (Moriondo, 1969: 311).

193 This was commonly the case in traditional African dispute institutions. *See, e.g.*, Fisher (1971: 732); Gulliver (1963: *passim*).

194 Both innovations were introduced in Kenya: a regular panel of judges, from whom the bench for a particular case was chosen at random (Phillips, 1945: 182).

195 In societies where the intervener is paid only for services rendered, he will naturally seek customers. If jurisdictional boundaries are unclear, or overlap, he will in effect be selling the service of intervention in a buyer's market. The history of dispute institutions is replete with interveners who have tailored their activities with this in mind (Collier, 1973: 73-74). Some have gone so far as to stir up disputes to handle (Cohen, 1966: 1221). This kind of competition is antipathetic to bureaucracy, and is abolished as jurisdiction is rationalized, and certain institutions obtain a monopoly over disputes.

196 Weber himself is not clear whether it is more bureaucratic to promote on the basis of the quality of task performance, or on the basis of length of service. The former is the distinctively bureaucratic criterion for appointment; the latter might be viewed as the routinization of bureaucracy. Accordingly, the two may be combined within a single institution: skill, measured by examination or performance, being the criterion for appointment and major promotions between ranks; seniority being the criterion for salary increases and other perquisites within the rank—as in the federal civil service.

197 Interestingly, this criterion does not distinguish sharply between traditional African elders and contemporary Continental career judges, except for the fact that only the latter are restricted from other activities by being a judge. *See, e.g.*, such Kenya tribes as the Meru (Lambert, 1947; Bernardi, 1959), the Kikuyu (Lambert, 1956; Kenyatta, 1953), or the Embu (Saberwal, 1970). Of course, this does not mean that those institutions are identical in other respects, nor that the concept of bureaucracy is useless in distinguishing them.

198 Akan judges could be removed by a higher chief, or by the people—and often were (Mensah-Brown, 1970; 128).

[199] Many industrious colonial administrators felt compelled to produce a handbook of rules for local court procedure. *See, e.g.*, the "Guide and Instruction to Native Tribunals," prepared by Wyn Harris, District Commissioner of Nyeri, in 1943, and described by Phillips as "a cloth-bound volume of 41 foolscap pages of typescript (with space for additions and amendments). It is in English and each tribunal has been supplied with a copy of it." And see the similar "Guide to Native Tribunals—Kiambu District" prepared by H. E. Lambert at the same time (Phillips, 1945: 43-44, 65).

[200] The confusion of public and private finances becomes a matter of concern to a bureaucracy, and is given the name corruption. Judicial administrators in colonial societies are frequently preoccupied with this subject. *See, e.g.*, Phillips (1945: Ch. 13).

[201] This is in part a consequence of the fact that bureaucratization of the role has often occurred under colonial rule. Where these norms are new, and derived from an alien culture, it is hardly surprising that the superiors who represent this culture use external sanctions to obtain compliance. It is not clear to me that these sanctions cannot be largely internalized. Here, as elsewhere in this paper, it is hard to avoid mistaking the concrete historical situation in which these changes took place for valid cross-cultural generalization. It seems to me that other authors have fallen into this error, *e.g.*, Tanner (1970) and Collier (1973), mistaking the cultural pluralism and social stratification which characterize contemporary Indonesia and Mexico for universal conditions, and therefore unduly generalizing from those legal systems. Yet in doing so, they are also correcting the errors of earlier writers, who tended to generalize from the legal systems of small, homogeneous tribal societies.

[202] It is interesting that this precisely parallels the distinction between law and convention offered by Weber.

> A system of order will be called *convention* so far as its validity is externally guaranteed by the probability that deviation from it within a given social group will result in a relatively general and practically significant reaction of disapproval. Such an order will be called *law* when conformity with it is upheld by the probability that deviant action will be met by physical or psychic sanctions aimed to compel conformity or to punish disobedience, *and applied by a group of men especially empowered to carry out this function* (this last emphasis added) (1947: 127).

[203] For explications of Weber's notions of rationalization in law *see* Trubek (1972a); Friedman (1966); C. Morris (1958); Rheinstein (1954). One of the problems with understanding Weber is that the English terminology into which he has been rendered carries strong connotations of value: rationality is a "good" kind of ordering, perhaps even the only proper kind; rationalization is a false, or hypocritical ordering. This is not entirely the fault of translation; Weber's original conceptual scheme undoubtedly expressed his own values.

[204] Indeed, Weber's purpose was to set forth all the possible modes of rationalization. For illustrations of legal rationalization under a variety of social conditions, *see* Llewellyn and Hoebel (1941) (Cheyenne Indians); Holleman (1950) (Shona of Rhodesia); Fuller (n.d.: 86) (American judiciary); Riesman (1951: 133-34) (American legal profession); Mayhew (1968: 146) (Massachusetts Commission Against Discrimination).

[205] The notion of the autonomy of a differentiated sphere of activity receives exceptionally clear expression in a most unlikely source:

> Society gives rise to certain common features which it cannot dispense with. The persons selected for these functions form a new branch of the division of labour *within society*. This gives them particular interests, distinct too from the interests of those who gave them their office; they make themselves independent of the latter and—the state is in being. . . .
> It is similar with law. As soon as the new division of labour which creates professional lawyers becomes necesary, another new and independent sphere is opened up which, for all its

> general dependence on production and trade, still has its own capacity for reacting upon these spheres as well. In a modern state, law must not only correspond to the general economic position and be its expression, but must also be an expression which is *consistent in itself*, and which does not, owing to inner contradictions, look glaringly inconsistent. And in order to achieve this, the faithful reflection of economic conditions is more and more infringed upon. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class—this in itself would already offend "the conception of justice."

This extraordinar Weberian formulation is in fact from Friedrich Engels, in a letter to Conrad Schmidt, written in 1890. *See* Marx and Engels (1947: 480-81). I am grateful to Brun-Otto Bryde for this reference.

206 Kaplan describes the decrease in communication between dispute institution and society which follows an increase in differentiation (1965: 93).

207 Fuller (n.d.: 86) and Golding (1969: 85-86) note that the institution redefines social problems for its own purposes, and will ignore problems that cannot be so redefined. Basil Bernstein makes a similar observation about the power of language to shape a social situation in order to facilitate a particular kind of communication (quoted in M. Douglas, 1970: 156-57).

208 Mayhew has analyzed at some length the way in which institutional solutions are not social solutions (1971). This inevitable consequence of differentiation is nevertheless a frequent source of concern to legal scholars, who deplore the "gap" between law in the books and law in action. I discuss this issue further in an extended review essay (1973).

209 The dispute institution in society can be viewed as maintaining a variety of homeostatic variables: the number of ongoing disputes, conceptualized in discrete units; the overall intensity of disputing, etc. It would be possible, and fruitful, to conduct a functional analysis using each of these variables; in the discussion that follows, however, I have concentrated on the aggregate number of disputes which the institution or the society is handling at a point in time. This level is often one of the principal concerns of the institution itself (*see* Sykes, 1969).

210 The formulation of functionalism presented here lends weight to the common criticism that it is a theory of the status quo which offers no insight into, indeed obscures the perception of, change. I therefore hasten to add that the dispute institutions of a society may, over time, fail to maintain the level of disputing; that level may increase—as has perhaps happened in contemporary urban society—or the society may, as a result of increased disputing, divide into a number of fragments—which again might be a helpful image for understanding the contemporary situation.

211 It is often argued that bureaucratic institutions apply norms which are universalistic rather than particularistic. This is one way of transforming the ideology of the rule of law into a social scientific variable. I will consider ways to operationalize this concept below.

212 Effort, unlike time or expense, is a subjective index of the quality of an act. It is an attempt to measure intensity; for example, I would expect a repetitive act to be less effort than an idiosyncratic one, even though both might take the same time and cost the system the same amount of money.

213 The Ethiopian "affersata" and the official Chinese court system are extreme examples of dispute institutions which maximize official efficiency at great expense to the non-official participants (Fisher, 1971: 720; van der Sprenkel, 1962). In the language of economics, these institutions externalize the latter costs.

214 These contributions may take the form of court costs in civil cases, or fines and bail forfeitures in criminal prosecutions. It is common for the latter to produce a net surplus, whether in India (Nicholas and Mukhopadhyay, 1962: 17, 24, quoted in Galanter, 1972: 60) or the United States (Saari, 1967: 297), although the practice has recently been subject to criticism on constitutional grounds in the United States. But it is not

unusual for civil litigation to produce a surplus as well. Alan Gledhill has noted that the Indian judiciary "is the most successful of the nationalized industries" (1964: 8, quoted in Galanter, n.d.). And the same might have been said of colonial Kenya (*see* Patterson, 1969). This may be attributed to the general British colonial policy of seeing that the colonies paid their way. It may be contrasted with Bentham's belief that judicial institutions ought to be free.

215 The interest of bureaucratic institutions in finality has been reported many times. Skolnick (1966) describes the way in which police bargain with suspects for "closings," offering a lesser plea in return for an admission of other crimes which will close files, but for which the suspect will not be prosecuted. Connecticut courts rarely take the initiative in litigation; a notable exception is their diligence in dismissing cases sua sponte after they have reached a certain age. The calling of the dormant list is one of the few occasions on which that bureaucracy shows real energy. By contrast, tribal institutions often refuse to conclude a dispute even after the parties have lost interest, for fear that some hidden grievance lingers. *See* Holleman (1952: 34).

216 *See* Trubek's discussion of the "core conception" of modern law (1927b).

217 I have taken this distinction from Black (1973).

218 Both traditional Chinese mediation (Cohen, 1966: 1217) and contemporary Chinese mediation (Lubman, 1967: 1321) had this character. So did traditional African dispute institutions—*e.g.*, the Akan of Ghana (Mensah-Brown, 1970: 143) and Ethiopia (Fisher, 1971: 726, 728). Even contemporary American culture retains something of this ideology, as witness the sense of outrage expressed at the failure of bystanders to intervene in the murder of Kitty Genovese.

219 This was apparently true of the traditional Chinese official court structure, as distinguished from non-governmental mediation. Indeed, the inertia of that system was so extreme that many cases were ended simply because the disputants could not mobilize sufficient energy to move the magistrates to action (Buxbaum, 1971: 274). The American judicial system is, of course, highly reactive. Indeed, Fuller makes this an essential element in his definition of adjudication (n.d.: 54). One could argue that the American legal system as a whole is still proactive, but that the latter function has been taken away from the judicial branch and given to the executive, in the form of police and prosecutors. Yet even these institutions, especially in urban areas, have tended to become reactive: police do not patrol a beat on foot but respond to calls in patrol cars; prosecutors pursue many criminal infractions only upon the insistence of a complainant.

220 *See* Aubert (1969c: 289). This characteristic of modern courts may explain why they fail to achieve certain goals which require a more active role—for instance, the preservation of marriage in actions for divorce. Courts in the United States (Goldstein and Katz, 1965: 140-61; Rheinstein, 1972: 59-60), in England (Rheinstein, 1972: 60-62), in France (Id.: 219-20), and in Poland (Gorecki, 1970) have all found that the requirement that an action for divorce be investigated by the court soon turns out to be a nullity. (Compare the success of Canon law in this regard, Rheinstein, 1972: 57-58.) This suggests, at the very least, a certain caution in giving the *court* responsibility for furthering important values—for instance, for securing "the best interests of the child" in custody disputes. The one exception to this generalized passivity is behavior which serves to terminate the dispute expeditiously, or simplify it; thus the court will not hesitate to raise, sua sponte, such conclusive obstacles to further litigation as lack of jurisdiction, res judicata, lack of standing, etc.

221 Thus one of the first acts of a colonial government is to outlaw certain modes of disputing which lie beyond the control of the newly introduced courts—feuding, revenge, self-help—and to regulate indigenous dispute institutions. Similarly, disputants engaged in litigation in western courts commonly have to obtain leave of the court for many actions while the dispute is pending; in addition, the court has authority to freeze the status quo by means of a temporary restraining order or an injunction pendente lite.

222 For the victim of a crime to compound the felony is itself a crime; the activities of the police are subject to elaborate scrutiny to insure that any crimes discovered are properly investigated; the prosecutor cannot drop the charges, or nolle a prosecution without the approval of the judge.

223 The dispute institution may urge, or require, the disputants to take their dispute to another institution first. Thus the local courts in Kenya commonly require disputants to consult with indigenous elders in at least some disputes (Abel, 1970: 50-59). Official Chinese courts similarly encouraged mediation (Cohen, 1966: 1210). And at least one appellate court in Kenya, held by a district officer, urged litigants to accept mediation by elders in place of a hearing before him (Phillips, 1945: 53-55). This practice is not unknown in European or American courts. The New York City small claims court offers litigants the choice of having their dispute mediated by a lawyer—with the incentive of a speedier hearing. In Poland, Jan Gorecki observed judges pressuring litigants to accept an uncontested divorce (1970). And I saw the same thing in the Family Relations Division of the Superior Court for New Haven County. Gellhorn has documented the way in which defendants are persuaded to agree in paternity suits, proceedings for non-support, marital fights, and matrimonial actions in the courts of New York City (1954: Chapters 7, 8, 9, 13).

224 American judges rarely reject a bargained plea in a criminal prosecution, or a negotiated property settlement in a divorce action.

225 The Akan of Ghana use simple, everyday language for all norms, even those that are consciously legislated (Mensah-Brown, 1970: 132). Where these norms fail to cover the disputed situation, maxims are cited from other areas of behavior (Id.: 135). A. L. Epstein found that general ethical notions pervade discussion in the local courts of Zambia (1952: 16-17).

226 This is consonant with Bohannan's notion of the reinstitutionalization of legal norms (1968a). Mayhew and Reiss have documented the fact that in our own society only those norms which concern the problems of the upper classes are reinstitutionalized in the legal system (1969).

227 Thus we find increasing emphasis on such ideas as neutrality, generality, universality, logically formal rationality.

228 Everywhere in Africa customary criminal offences have been replaced by a comprehensive written Penal Code (McClain, 1964: 196).

229 *See, e.g.*, Fallers (1969: 68-69) (Soga of Uganda); Nekam (1967: 47) (Karamojong of Uganda). This is true in non-colonial situations as well. Local Ethiopian institutions treated the Fetha Nagast as custom (Fisher, 1971: 712), and dispute institutions on the East African coast, in the Sudan, and Northern Nigeria, gave a similar treatment to the Sharia.

230 Twining has compared the restatements of African customary law prepared by Cotran, a lawyer, and Cory, a sociologist; and he has noted that local courts tend to treat even the latter restatement as though it were a statute (1963: 33, 37-51). More recently, Saltman has observed the use made of Cotran's restatements in the local courts of Kenya, and noted that they are given almost statutory force despite the fact that they contain explicit cautions against such an intent (1971).

231 Indeed, Saltman (1971) explains the use of the Kenya restatements as a protection against reversal on appeal. District Magistrates increasingly feel the need for such a guide because they are often from another part of Kenya, and unfamiliar with the customary law they must apply. Some even seek to avoid applying customary law altogether. In recognition of this, the Chief Justice felt compelled to issue a memorandum reminding District Magistrates of their duty to apply customary law, and to take evidence where they were ignorant of its provisions (Circular No. 1 of 1968, November 5, 1968).

232 Writers on undifferentiated dispute institutions frequently comment on the high degree of agreement upon, and knowledge of, customary norms. True, this contrasts sharply with the disagreement in our own society concerning legal norms, and the widespread ignorance about those norms. But the more appropriate comparison is with the degree of consensus and knowledge displayed by the legal professionals who staff our own more differentiated institutions.

233 Codifications and restatements of customary law can be found very early in colonial history. *See, e.g.*, Natal Code of Native Law (1943) (South Africa; 1891); Haar (1948) (Indonesia; nineteenth century); Schapera (1938) (Bechuanaland); *see generally* Abel (1969a). More recently, the Restatement of African Law Project has devoted considerable energy toward this end (*see* Allott, 1968-72), and a number of African nations have begun to codify their law, most notably Ethiopia.

234 In Akan law, an oath may be sworn to initiate proceedings, but there is no preliminary inquiry into the content of the substantive grievance (Mensah-Brown, 1970: 139 ff.). The contrast with the later history of English law is extreme (*see* Maitland, 1962: 4-5). Buxbaum (1971: 263) and Cohen (1966: 1211) disagree over whether Chinese magistrates made such an inquiry. It would be reasonable to expect a more stringent screening of disputes as the state became more involved in their handling.

235 An example of this may be the dramatic curtailment in the chain of causation which will be investigated by the intervener. Traditional dispute institutions in Africa, investigating a death, will review all the antecedent events, however remotely they may be connected (Hopkins, 1962: 8). Where the ultimate outcome of a course of conduct is still in doubt, the hearing of the dispute will be postponed to await it (A. L. Epstein, 1952: 9). Contrast this with the limitation of liability in Anglo-American tort and contract law to "foreseeable" consequences.

236 Holleman notes of the Hera that during a hearing of a dispute, participants exert pressure for the broadest definition of the issues (1952: 38). A. L. Epstein has observed a gradual narrowing of the issues in the urban courts of the Zambian copperbelt, where the inquiry in matrimonial proceedings now concerns whether grounds for divorce exist, rather than whether the marriage has broken down (1952: 4-5, 9-10). Hopkins observed that Ankole courts judge the whole person, not just the act, in a criminal proceeding (1962: 11). And our juvenile courts tend more in that direction than do our regular criminal courts.

237 Compare contemporary Chinese mediators (Lubman, 1967: 1308) or Hera dispute institutions (Holleman, 1952).

238 A fascinating instance of this is the Ethiopian practice of placing wagers upon the outcome of an intervener; because the size of the wager frequently exceeds the amount in controversy, the actions of the intervener become more important than the original dispute (Fisher, 1971: 734-37).

239 In the undifferentiated structure, the only relationship necessary for participation was some kinship or like connection with a disputant. In the differentiated structure, it is necessary to demonstrate a personal interest identical to that of the disputant.

240 It is a valid, if much abused, generalization that relations between groups are extremely important in tribal society. Hence a dispute that began with the conflicting claims of individuals may quickly be transformed into a dispute between the largest groups which do not yet include both (Holleman, 1952: 30). Many observers have noted that as such societies are westernized, an individual who had acted as representative of a group in a dispute now seeks to arrogate to himself personally the interests he is seeking to vindicate. This is especially visible in the area of land ownership. In Kenya, Kikuyu fathers suing for the impregnation of their unmarried daughters claim for themselves the goats that previously went to their kinship group. Thus disputes between groups are transformed into disputes between individuals. In highly differentiated legal systems, such as our own, there are substantial restraints upon litigation by a group, as in the technical problems of class actions, and perhaps also the doctrine of political questions.

241 This is clearest in criminal prosecutions. Recently, criminal accused have sought to turn the tables on the state, and accuse it of crimes in turn: those who have protested against the war in Vietnam are an outstanding example. Without exception, American courts have rejected such attempts. In an action for divorce, the defendant has the option to file a counterclaim. If he does so, however, he runs the risk that divorce will be denied to both parties under the doctrine of recrimination (at least until recently). If he fails to do so, and appears at the hearing, the court is likely to deny him an opportunity to speak.

242 The whole concept of standing is a development of the differentiated dispute institution, where it is narrowly viewed: a person who, in the larger society, is seen as having a real grievance, will be found to have no standing in court (*e.g.*, suits by taxpayers, conservationists). The victim is not party to a criminal prosecution in American law, although interestingly he is in Soviet law (*see, e.g.*, Feifer, 1964). By 1966 at least one of the primary courts in Kenya (the Kiambu District African Court) had begun to deny the victim a civil remedy in a prosecution. On the other hand, contemporary Ethiopian efforts to eliminate, or at least to control, the participation of the victim in a criminal prosecution, have not been very successful (Fisher, 1973). It seems to me that their lack of success can be attributed largely to the relative lack of differentiation of the institutional apparatus for criminal prosecutions in Ethiopia.

243 A. L. Epstein found that in Lunda (Zambia) customary law, the husband had come to substitute for the wife's father in actions for adultery (1952: 8). And Simon Roberts found that Kgatla (Botswana) women, rather than their fathers, now sue for impregnation (1971: 72). In Kenya, the same result occurred for the ten year period 1959-69 when the Affiliation Act was in effect.

244 Obvious examples are the prosecutor in American law, and the procurator in Soviet law. But there are many others: the welfare department which represents the interest of a child in a neglect hearing; the family relations officer who does the same in a custody fight during divorce. Even the professional attorney may be seen in this light—an officer of the court, who represents the party and yet is subject to control by the court. Blumberg has given a striking portrayal of "defense lawyer as double agent" (1967). Perhaps for this reason, American courts are extremely reluctant to allow a criminal accused to conduct his own defense, as the Chicago trial of Bobby Seale showed. It is interesting that African courts initially allowed a disputant to be represented by anyone—a friend or relative—but have recently moved in the direction of granting a monopoly of representation to legal professionals.

245 Maine emphasized this notion (1950: Ch. 5), and many others have since taken it up.

246 The Ethiopian practice of placing wagers on the outcome of a dispute effectively makes the betters additional parties (Fisher, 1971: 737). The requirement that a party have a surety has a similar effect; see Fisher (1971: 731) (Ethiopia); Brockman (1972: passim) (China). Even Connecticut has the residue of a similar practice; every party who initiates a civil action must have a surety for the payment of court costs. In contemporary American law, the amicus curiae, or the stockholder in a derivative action may be examples of parties created by the institution.

247 As the dispute institution becomes less tolerant of disputant delay (*see* notes 215, 219 *supra*), it creates delay of its own. An overcrowded calendar is one of the identifying marks of the contemporary western court; it may take as long as seven years to have a negligence case tried to a jury in New York City. This is not just one of those incomprehensible hassles of modern life, but an inevitable consequence of structural developments (*see* Sykes, 1969). An increase in differentiation means a decrease in the number of interveners who serve a given population; an increase in bureaucratization means an increase in the formality of the procedure, with the associated delays. The convergence of these two tendencies is truly Kafka-esque: the disputant may be required to wait his turn with a legion of fellow petitioners, and to wend his way slowly through the bureaucratic maze, only to discover that his claim is barred because he did not prosecute it with sufficient diligence.

A comparable situation has recently arisen in an Italian criminal trial, in which the prosecution has found itself unable to complete the appeals process before the statute of limitations runs on the crime (see New York Times, February 27, 1974, p.5).

248 It is one of the ironies of judicial reform in the United States that the small claims court, which was intended to be a relatively undifferentiated forum, has become largely a mill for administering default judgments. Although non-appearance of a party is penalized in this way, non-appearance by a lawyer is commonly excused.

249 This is obviously the case in criminal prosecutions where, in addition, the defendant is further penalized for his non-appearance. An even more extreme situation is one where the court keeps one of the parties away from the hearing, and thereby defeats the claimant's petition. *See Leonard v. Mitchell* (1973) (Court refuses to compel the Attorney General to disclose the whereabouts of petitioner's ex-wife, who had absconded with the children of whom he had been granted legal custody, since she had remarried a government informer whose identity was secret).

250 The defaulting party is in effect punished for wasting the court's time by making it hear the matter twice. The punishment may take the form of additional costs paid to the court. The other party is not compensated, although he also had to appear in court twice, possibly at considerable personal cost and inconvenience.

251 Fuller (n.d.: 56) makes this an essential element in the definition of adjudication.

252 The first is sought by voir dire of the jury, by moving that a judge recuse himself, or by requiring that the hearing judge be different from the judge who conducted the arraignment. The second is sought by secluding the jury and controlling access of the mass media to the case. But because the judge is more differentiated from private disputants than he is from other professional quasi-official members of the dispute institution, his isolation from them is substantially less complete; a judge who would never be caught hob-nobbing with a criminal defendant, or a civil plaintiff, will nonetheless socialize with prosecutors and lawyers.

253 Anyone who has practiced in an American court is familiar with the reluctance of many judges to hear evidence. Whatever the latter may protest, this is often not a function of caseload. Many studies have shown that judges spend only a small part of the day on the bench. *See, e.g.*, Mileski (1971: 509). Casual observation confirms this. At the hearing of uncontested divorces in the Superior Court for New Haven County, for instance, judges often refuse to listen to anything substantive by the defaulting husband; when custody is contested ,the judges prefer to send the case for investigation by a family relations officer, and decline to hear any evidence beyond what is contained in the report of that officer.

254 A. L. Epstein finds presumptions commonplace in an African urban court (1954: 13), and Hopkins describes the use of inferences from motive, from the failure to answer an alarm, and from the sudden accession of substantial wealth, in criminal prosecutions in Uganda (1962: 2-4).

255 Gluckman's concept of the reasonable man—the paradigm for inference in tribal courts—is actually a device for introducing into the dispute institution all the common sense expectations about behavior in the outside world (1955: Ch. 3). Compare the much more technical chains of inference employed by American courts, *e.g.*, those which must be followed in authenticating documents.

256 *E.g.*, evidence of prior crimes in the course of a criminal prosecution.

257 *E.g.*, evidence which would disclose that the defendant was insured in a tort action.

[258] *E.g.*, the rule that excludes a wife's testimony against her husband on the ground that such testimony would destroy the marital relationship. *See Hawkins v. United States* (1958). It is characteristic of the sense of self-importance acquired by interveners in differentiated dispute institutions that they come to believe that everything they do in the role of intervener has an impact outside the institution, and an important one at that. They thus come to rationalize their actions on that basis, never inquiring whether those actions make any difference in fact. A good example is *Pashko v. Pashko* (1951), quoted by Goldstein and Katz (1965: 131). There a judge in an action for separate maintenance ordered the "other woman" to stay away from the erring husband during the pendency of the proceedings, saying:

> Divorces are at a scandalously high level in the United States today. Courts should use whatever powers they have to stem the tide. A restraining order against the third party in this case will be notice to others deliberately intent upon breaking up a family to take heed and desist from their course. The court is convinced that it will deter others from similar action and become a shield in protecting the integrity and the sanctity of family life in our community.

Law schools foster such thinking by training students to analyze the "policies" underlying judicial decisions, and to criticize those decisions in terms of their own policy objectives.

[259] An example of this can be found even in Kenya customary law: in an action for cattle trespass, the complainant must summon an elder to view the cattle on the damaged land, at least if the trespass has occurred during the day. Without the testimony of such an elder, the complainant is unlikely to succeed, unless he has a very good explanation for its unavailability.

[260] It is the rare airing of a dispute in which the presentation of evidence is not ordered to some degree. At the very least, there will be regularity concerning which party speaks first, and when witnesses are heard (*see, e.g.*, Fisher, 1971: 734).

[261] I was impressed by the frequency with which parties in litigation before the primary courts of Kenya stated in court that they did not call a witness because he was hostile and would therefore lie, or refuse to come. They were either unaware of, or unimpressed by, the capacity of the court to compel the appearance of witnesses, and to punish perjury. These expectations about perjury, however, permit the inference that any witness whom the party fails to call does have hostile evidence, and that every party he does call is biased. *See* Hopkins (1962: 10) (Ankole of Uganda); S. Roberts (1971: 72) (Kgatla of Botswana); A. L. Epstein (1954: 16) (urban courts of Zambia).

[262] A striking American example was the contempt citations imposed on witnesses summoned before the numerous inquiries into loyalty in the 1950's, who refused to name friends and political associates. The reasons they gave—privacy and the bonds of friendship—are certainly important values in American society, but they carried no weight with the Congressional committees or courts. The current debate over the news reporter's privilege raises the same issues. It is interesting that the imperial courts of Ethiopia also punished the failure to disclose the names of offenders (Fisher, 1971: 717).

[263] That this notion is alien to tribal dispute institutions is shown by the numerous actions initiated in the primary courts of Kenya complaining of testimony given in previous actions in the same courts.

[264] The widespread publicity which attends the occasional sensational trial should not mislead; almost all American trials receive far less public attention than do disputes heard in tribal settings. Yet the misperception is very common; in preparing parties for the hearing of their uncontested divorces, I was frequently asked whether there would be press coverage; in fact, the press could not be less interested.

[265] *See, e.g.*, Holleman (1952: 40) (the widespread use of tokens as material symbols in Hera procedure).

[266] Continental procedure may represent a further development along these lines. There, an examining magistrate accumulates and digests the evidence before presenting it to the judge (Merryman, 1969: 37).

[267] Parties may be encouraged to submit affidavits rather than present testimony; ultimately, the affidavit may became the only vehicle for offering evidence, as in hearings upon alimony in the New York Supreme Court (*see* Gellhorn, 1954: 340-42). Alternatively, parties may be allowed, indeed encouraged, to file cross-motions for summary judgment.

[268] Among some Kenya tribes, a traditional mode of establishing the paternity of a child born to an unmarried girl was for the elders to compare the child with the putative father. Today, both parties and court are more likely to request a blood test. Simon Roberts notes the same development in Botswana (1971: 73).

[269] *E.g.*, in American courts, the assessor in mortgage foreclosures, the psychiatrist in insanity hearings in criminal trials, the social worker in the juvenile or family court.

[270] Thus Hopkins notes that Ankole judges give considerable weight to threats made by the accused prior to the alleged crime, and overheard by others (1962: 1).

[271] I refer here to the general contours of, and rationale for, the rule; of course, there are numerous exceptions.

[272] This observation can be generalized for a wide range of behavior: in the undifferentiated institution the norms and sanctions are those of the larger society; in the differentiated institution the norms diverge and the institution imposes its own sanctions. Consider such behavioral items as: dress, demeanor, speech, posture.

A defense lawyer in a recent criminal trial in the New Jersey Superior Court remarked at the end of the judge's charge to the jury that it was "one of the best state summations I've heard in the last five years." He was immediately held in contempt and sentenced to four days in jail for a "sarcastic" remark which tended to "degrade and humiliate the court" (*New York Times*, July 27, 1973: p. 33). Outside the courtroom, few people consider sarcasm, however effective, a criminal offense, nor would they expect it to deserve a jail sentence.

[273] *See, e.g.*, the thief seeker, or the use of oathing in Ethiopia (Fisher, 1971: 721, 737).

[274] At first only witnesses take the oath; parties are still expected to give self-serving testimony. The nature of the oath also changes: the more serious tribal oaths frequently endanger the lives of the entire family of the affiant; judicial oaths only bind and affect the affiant himself.

[275] A. L. Epstein found no concept of perjury in the urban African courts he investigated (1954: 16).

[276] In Kikuyu customary law, the paternity of an illegitmate child may be proved in a wide number of ways, including the testimony of the child's mother. Under the Affiliation Act, which was applied to the Kikuyu in 1959, the mother's testimony required corroboration by at least one independent witness. Primary courts alternated between ignoring this requirement and applying it with the utmost rigidity.

[277] The intervener is no longer drawing an inference from the failure to produce the evidence, but punishing the party with the sanction of loss of the lawsuit.

[278] An example of the tension between these two conceptions may be found in the doctrine of res ipsa loqitur in American tort law.

[279] This allows a wide variety of behavioral standards to be voiced during the airing of the dispute, and thus the penetration of many non-legal norms within the dispute institution. *See* Gluckman (1955: Ch. 3); A. L. Epstein (1954: 7-8, 12, 17).

[280] Such expectations may be used to substantiate as well as to invalidate testimony. An admission of adultery is so unlikely in Zambia that it is generally given credence (A. L. Epstein, 1954: 14). Similarly, an unmarried girl in Kenya is so unlikely to divulge her love affairs that she is generally believed when she names the father of her illegitimate child, although this is now changing.

281 In Kenya, this development has taken the form of misconstruction of the doctrine of estoppel. In Anglo-American law, a party may be estopped from denying the truth of a statement made outside the court where he has induced his opponent to rely on that statement to the latter's detriment. In Kenya, judges will not allow a party to contradict testimony given earlier in the proceeding, or in an earlier hearing. There is no injurious reliance by a party here; the only reliance is by the court. In effect, what the court has done is to take a rule originally devised to achieve substantive justice and employ it to facilitate the task of the court in judging. The court is saying, in effect: the inconsistencies in your testimony show that you are lying; because you have sought to deceive the court, we will punish you; instead of trying to determine the truth, we will now arbitrarily choose to take your first statement as correct.

282 Presumptions in American law often have nothing to do with probable behavior in the real world. Rather, they are extreme examples of rules devised by the dispute institution for convenience in deciding, which then come to assume the form, and perform the function, of primary substantive rules about behavior. The presumption of the legitimacy of the offspring of a marriage may be an example: the presumption is certainly not an empirical statement about sexual mores; nor, today, is there any substantive legal rule that children *should* be legitimate; yet the presumption seems to have become just such a rule.

283 A. L. Epstein explicitly notes that this inference is *not* generally drawn (1954: 9). Compare the Roman legal maxim sometimes invoked in Anglo-American law: *falsus in uno, falsus in omnibus.*

284 Notions of full faith and credit, and even more of comity, are late developments in the bureaucratization of dispute institutions.

285 *See, e.g.,* Schapera (1957) (Tswana). A. L. Epstein describes disputes in Zambia as homilies on good behavior (1954: 18).

286 Yet there is never complete disregard for normative consistency; Maine's *themistes* and Weber's *kadi* justice remain ideal types. Tanner describes tendencies toward consistency in an extremly undifferentiated dispute institution (1970: 384).

287 Traditional Chinese law was also suspicious of precedents; citing a precedent was like "making a mark on a moving ship to show where to recover a sword which has been dropped over its side into the river. . . . Human nature is infinitely varied and there never is a case which is exactly the same as the one that has been decided before" (Wang Hui-tsu, "Precepts for Local Administrative Officials," quoted in Lubman, 1967: 1291 n. 18). Nekam attributes strikingly similar ideas to magistrates in Uganda: "'Each case is different' they will tell you: 'how could you use precedent if you find that the facts are not exactly the same.'" (1967: 53). The opposite extreme might be represented by the "slippery slope" argument frequently found in Anglo-American judicial opinions—if we decide this here, we will be *forced* to decide that later.

288 As in the distinction between law and equity, and their separate courts; at a much lower level of internal differentiation—the separation between adjudicating guilt in a criminal trial and sentencing, or between determining liability in tort and assessing damages.

289 Fallers (1969) deals with this at great length, relying heavily on Levi (1948).

290 Relatively undifferentiated dispute institutions refer to prior disputes, but only as exemplifying a general standard (A. L. Epstein, 1954: 27); increasing differentiation is necessary before the doctrine of stare decisis is followed—in the sense of the binding force of a prior ruling upon similar facts. Compare Mayhew's description of the Massachusetts Commission Against Discrimination (1968: 223). A system of precedent requires, at a minimum, the effective communication of decisions, and this is something which is found only in highly bureaucratized institutions.

291 Societies vary greatly in the degree of differentiation within their political institutions. At a fairly low level of differentiation, the same institution declares norms and handles disputes. With increasing differentiation, these processes may be distinguished, though still performed by the same institution. *See, e.g.,* Mensah-Brown (1970: 132) (Akan).

Specialized legislatures in contemporary European societies are often an outgrowth of dispute institutions. Even in the United States, with its insistence upon the separation of powers, institutions tended to perform both functions rather late. *See, e.g.*, the legislative jurisdiction in divorce in the mid-nineteenth century (Blake, 1962: Ch. 5).

292 The writings of American lawyers, law professors, and the restatements of the American Law Institute are outstanding in this regard.

293 Thus Mensah-Brown writes that Akan judges have no consciousness that change in customary law has occurred (1970: 131). And Kaplan, applying the terminology developed by Llewellyn and Hoebel (1941), finds that change in Chagga law follows a pattern of drift—filling in gaps—rather than drive (1965: 90). *See generally* Mair (1962: 103).

294 These are Hart's secondary rules of change. One of the central problems of jurisprudence has been the extent to which these rules and the rules of recognition and adjudication are similar.

295 Indeed, this very differentiation may be part of the explanation for the startling fact that in our own century—apparently for the first time—law has come to be seen as an instrument for radical social change. *See, e.g.*, Friedman (1973).

296 Maine may be the origin of this idea (1950: Ch. 2). Beidelman has found it applicable in the African context (1961).

297 A number of writers have found implicitness to be an outstanding—even the outstanding—characteristic of the African dispute process, *e.g.*, Fallers (1969); A. L. Epstein (1954: 6). The characteristic is certainly not limited to Africa; Mayhew found it during the early years of an American regulatory agency: "rules on the substantial matters of discrimination have not been formulated. Issues have been resolved implicitly on a complaint-by-complaint basis" (1968: 117).

298 One example of this developing interest may be the fact that the intervener begins to ask: Which norms are applicable? That is, he becomes conscious of conflicts of law problems. This awareness is almost entirely absent in undifferentiated institutions, which tend to apply the lex fori unquestioningly. *See, e.g.*, Nekam (1967); Twining (1963: 25).

299 It would obviously be impossible for a dispute institution charged with the day-to-day processing of disputes to become preoccupied with the definition and change of the norms which are to goven those disputes. Dibble has documented this for American trial courts (1973). But jurists have always known this, if they have been unhappy with the knowledge. Cardozo writes: "Those cases [where the controversy turns not upon the rule of law, but upon its application to the facts], after all, make up the bulk of the business of the courts. They are important for the litigants concerned in them. They call for intelligence and patience and reasonable discernment on the part of the judges who must decide them. But they leave jurisprudence where it stood before" (1921: 163).

300 Hera dispute institutions used concrete tokens, which were transferred between the disputants, to symbolize acts which would later be performed outside the institution (Holleman, 1952: 36).

301 Lubman notes that contemporary Chinese mediators are unusual in their ability to supervise future conduct (1967: 1308 n. 95). American courts are notoriously ineffectual in this regard, as illustrated by their incapacity to enforce regular payments of alimony and support following a divorce decree.

302 It is striking that disputes in traditional African customary law over bride-price or cattle loan agreements, which required the return of the identical cattle given or loaned, can now be settled by the payment of money.

303 I think this latter statement is a fair characterization of the American judicial system, with one significant exception: where very large organizations are involved in highly complex litigation, the court often seeks a consent decree. I think this is partly explained by the necessity for regulating a course of future conduct, and partly by the lower degree of differentiation between the court and parties. That the court often

asks the successful party in other cases to draft a judgment is *not* an exception; the court, by this device, simply saves itself effort, while retaining full control.

304 With respect to criminal law, this has become an element of procedural due process in most countries with Anglo-American legal systems. The African Conference on Local Courts and Customary Law unanimously resolved that unwritten customary criminal penalties should be abolished (1963: 24); this has since been incorporated in the constitutions of most African states, and such penalties have in fact been eliminated.

305 The relatively undifferentiated Hera dispute institutions involve all those who participated at the hearing in administering the remedy (Holleman, 1952: 38). One example of the way in which the differentiated institution fashions a remedy in terms of its own actions is the division between civil and criminal sanctions; where these were both imposed in a single hearing, they now require two separate actions.

306 This may seem to be contradicted by many of the early tabulations of harsh penalties under customary law. But there is other evidence indicating that those schedules represent ideal punishments at most, and quite possibly distortions of those ideals. Ethnographers who have studied the punishments inflicted invariably find that the ideals become a basis for making threats, establishing bargaining positions, and that the actual punishments are far milder. *See, e.g.*, MacGaffey (1970: 105-06, 127, 131); Holleman (1952).

307 By this I mean that the institution *expresses* such a concern, and proceeds to rationalize its actions in terms of that goal. Thus we find a harsh penalty justified not by the instant crime, but by the increase in crimes of that sort in the community (Hopkins, 1962: 11). A *legal* logic thus links the differentiated dispute institution to behavior in the outside world. It is a measure of the differentiation of the institution that, while the little empirical evidence we have strongly suggests that the penalties inflicted by the institution are largely ineffective to achieve the goal sought, yet that logic is not abandoned or altered.

308 The logic of general deterrence thus permits the differentiated institution to gain (apparent) efficiency, increasing the severity of its sanctions so as to decrease the number of instances in which it must act.

309 The undifferentiated dispute institution leaves the task of enforcement to the disputant (see, e.g., Fisher, 1971: 742). Because this endangers finality and certainty, the differentiated institution affords facilities for enforcement to civil litigants, and enforces the decree itself in criminal cases.

310 Richard Canter, who has done fieldwork in the local courts of Zambia, has remarked on the frequency with which they punish, as criminal contempt, the failure by civil defendants to satisfy a judgment. In New Haven, former husbands, who had fallen in arrears in the payment of alimony and support, were treated with some severity by the Superior Court; but when they violated a second order of that court, they were invariably threatened with jail, and often actually jailed.

311 Review should thus be distinguished from the availability of alternative institutions to which a dispute may be brought. Most societies offer some alternatives to the disputant; fewer societies offer review in the sense described below. Failure to appreciate the distinction may help to explain the irritation which European colonial administrators felt at the propensity of African litigants to seek repeated review of the decisions of lower courts. The African litigants, dissatisfied by the outcome, may simply have been seeking *another* airing of the dispute; European administrators could only conceive of these subsequent hearings in hierarchical terms as *reviewing* the earlier decision. The European preference for this latter relationship between institutions may be seen in the *Report of the Mission on Land Consolidation and Registration in Kenya*, 1965-66 (1966: 33).

An intermediate stage between repeated hearings by institutions which are different in kind but equal in authority, and hierarchical review in the sense described below, may be appeal to an institution or individual which is seen as possessing charismatic authority to correct injustice. Henry Morris describes African litigants who sought the intervention of the District Officer in this manner (1970: 17), and I heard similar stories of petitions to the Governor of Kenya which by-passed the correct appellate procedure to request direct intervention. This approach seems to derive from an attitude toward monarchical rule which sees the king (or his representative) as the fount of justice—a justice frequently perverted by his officials, though without his knowledge (Hobsbawn, 1959: 119-21). This attitude toward the Emperor still prevails in Ethiopia (Fisher, 1971: 740-41).

312 *E.g.*, the Inspectorate of Native Courts of Northern Nigeria described by Smith (1968: 67). In a sense the whole concept of review runs contrary to many of the developments already noted: it undermines certainty, prolongs the achievement of finality, and diminishes efficiency. We may be able to harmonize the development of review with the theory presented here if we see the institution as responding not to the demands of the disputants, but to an internal interest in correcting its own errors.

313 Where the same institution engages in both initial hearings and the review of initial hearings held elsewhere, those two processes will retain some similarities. This was true in much of Africa. *See, e.g.*, Fisher (1971: 715) (Ethiopia); Mensah-Brown (1970: 125) (Akan of Ghana); Smith (1968: 61) (Northern Nigeria). As the institution comes to specialize exclusively in review—which is the case of almost all American appellate courts—the process will develop divergent characteristics.

314 This development parallels the shift in focus at the initial hearing from substantive to procedural issues, discussed earlier.

315 Fallers notes that in Busoga, the appeal is treated as a new action between the disputant aggrieved by the original outcome, and the original intervener; the other disputant is not even formally a party (1969: Appendix B). In the extreme, the review comes to resemble a prosecution of the original intervener by the reviewer.

316 Kaplan reports that the decisions of Chagga appeal courts were communicated only to the intervener whose decision was reviewed (1965: 85). I found a divergence of practice in Kenya: some decisions were not even communicated to the court whose judgment was being modified; where this was done, other primary courts in the jurisdiction were not notified; yet decisions of the Court of Review were circulated (*see* Abel, 1969a: 612-26; Barnett, 1965: 117).

317 This is not to deny that the distinction is wholly arbitrary. I have limited my microsocial theory to an explanation of dispute process in terms of the characteristics of the intervener. I therefore discuss the influence of disputant relationships via the mechanism of disputant choice under the heading of macrosocial theory; it could just as readily have been included within the former category.

318 The same example can be used to suggest some limiting values for role differentiation. I cannot imagine a society in which every person greets every other person in the same way.

319 Certainly interveners handle a larger proportion of disputes in our own society than in, for instance, that of the !Kung Bushman (Marshall, 1960; Thomas, 1959), or Bambuti pygmies (Turnbull, 1961; Turnbull, 1965). Why this is so, though an important question, is beyond the scope of this paper.

320 Kluckhohn (1960: 394), citing Dodds (1957). But mere physical density does not produce interaction. Contemporary western city dwellers have learned how to minimize their significant contacts under conditions of very high physical density.

321 Even social interaction may not produce disputes if a society endows its members with a personality disposed to internalize conflict and avoid dispute, as has been claimed for many cultures of the Far East, especially those under the influence of Confucianism.

322 This seems to me one posible refinement of Lawrence Friedman's notion of legal culture (1969): legal institutions operate in certain ways because of societal pressures, and then come to value that mode of operation.

323 This assumes no conscious manipulation of the institution to avoid that result. Recently we have seen a variety of devices used to reduce differentiation: quotas in the selection of personnel from each subgroup; fragmentation of society into smaller units, each with its own institution.

324 Macaulay notes that though some larger business organizations in the United States do this, most do not (1963).

325 Mayhew and Reiss (1969) have shown that the American legal system is inaccessible to many poor people because it does not recognize their problems as legal problems.

326 An excellent history of gradual judicial development in response to evolutionary social change is that of J. Dawson (1960).

327 Nisbet (1969) gives a comprehensive statement and persuasive critique of the organic analogy in history.

328 *See* Diamond (1935) and later writings; Hobhouse (1914) and later writings; Carlston (1968). This notion appears to be one element of what David Trubek has characterized as the "core conception" of much of contemporary scholarship on law and development (1972b).

329 Southall's dichotomy strikingly resembles Maine's distinction between static and dynamic societies (1950).

330 Among the proliferating literature on this subject, the following offer useful descriptions or analytic insight: Kanter (1972); Houriet (1971); Fairfield (1972); Zablocki (1971). Kanter and Zablocki also contain excellent bibliographies.

331 A great deal of political, especially racial, unrest in America has focussed upon the police. Many of the demands are specifically directed toward reducing social differentiation: minorities should be represented on the force; police should live in the community which they serve. But these demands have also been made of judicial institutions, *e.g.*, that minorities be represented on juries, that at least token appointments of black judges be made, that blacks be admitted to law schools.

332 Mayhew (1971: 197) notes that black demands have shifted from integration to separatism, but he fails to see that both are demands for reduced differentiation, though within different frames of reference.

333 Again, controversy over the police offers the best example. Civilian Review Boards have been a consistent demand, violently resisted. Numerous other methods have been suggested to increase popular control. *See, e.g.*, Chevigny (1969); Skolnick (1966); *Virginia Law Review* [Note] (1969). The Berkeley, California, referendum to decentralize the police force—twice defeated—is another example.

334 *See* Isaacs (1917); *see generally* Graveson (1953); Friedmann (1959: Ch. 4). This phenomenon has been observed most often with respect to employer/employee relations. But Macaulay has also reported it for relations among businessmen (1963).

335 Fuller (n.d.: 74) acknowledges that adjudication is poorly suited to polycentric disputes.

336 I have found this in Kenya; Lawrence Friedman is in the process of documenting it for America; Marc Galanter observes it in India (1972a: 59 n. 38). And Adam Podgorecki informs me that sociologists have noted it in Italy and Finland.

337 Legal history is replete with competition for business among judicial institutions; Abel-Smith and Stevens (1969) present numerous contemporary instances from England.

338 This monopoly was recently noted in *Boddie v. Connecticut* (1971). I think it is accurate to observe an increase in state monopolization of the power to alter significant status: even control over marriage and divorce is only a phenomenon of the last hundred years.

339 Lawrence Friedman in the United States, and I in Kenya, have both found that court dockets have shifted from disputes between private litigants to quasi-administrative matters.

340 William Felstiner has noted the popularity of that solution in contemporary America, and is currently analyzing why Americans "lump it" (1973).

341 This is epitomized in an epigram which, in its variant forms in different parts of Africa, is commonly translated as "we marry those we fight."

342 The only obligation of the American citizen to his dispute institutions is jury duty. It is indicative of our ordering of the importance of conflicting duties that citizens are excused from serving on a jury for numerous reasons; it ranks lower than the duty to keep house, to perform professional activities, etc. By contrast, political activity has a very high priority in tribal socities, and in contemporary American communes. Elia Katz gives an amusing, if probably exaggerated, account of the energy devoted to handling disputes among the Family, a group in Taos, New Mexico (1971: 116-58).

343 This is the inverse of Weber's perception of the linkage between legal rationality and the rise of capitalism. *See* Trubek (1972a).

344 *See generally* the bibliography prepared by Ietswaart and Tiruchelvam (n.d.).

345 *See* the African Law and Tribal Courts Bill (1969), and the accompanying legislative debate.

346 *See* the Local Courts (Amendment) Bill (1969) and the Criminal Law (Amendment) Bill (1969) and the accompanying legislative debates.

347 *See* the discussion in tenBroek (1971: Ch. 3).

348 Even this is not clear; attempts to assert stronger controls over the police, by means of de-centralization, were opposed by a majority of the black population of Berkeley.

349 Marc Galanter has amply documented the opposition of Indian lawyers to the revival of traditional *panchayats* (1972a: 56-57 and *passim*). The defeat of Chilean legislation which would hve created neighborhood tribunals may be a contemporary example.

350 One illustration of this is the history of marital counselling schemes attached to divorce courts. Often initiated with considerable enthusiasm, they have frequently been abolished shortly thereafter because they were thought to be too expensive. See, e.g., Bodenheimer (1961) (Utah); Goldstein and Katz (1965: 150-161) (New Jersey); *New York Times*, June 2, 1973: p. 1 (New York).

351 *See In re Gault*, (1967), and the discussion of alternative models of criminal procedure in Griffiths (1970).

352 There is a lengthy literature on the "failure" of the small claims court. *See, e.g.*, Small Claims Study Group (1972), and its bibliography.

353 A striking instance of such pressure is the recent recommendation by the Canon Law Society of America that Catholic marriage tribunals be eliminated, and that in their stead some radically different institution be established, which might include psychologists and social scientists as well as priests, and seek to counsel rather than to adjudicate. *See New York Times*, Octobr 19, 1973: p. 11, col. 1.

354 The family court movement in the United States during the present century is an excellent example of continucus pressure in this direction. At the same time, its repeated failure to achieve the stated goal of a thorough inquiry into the underlying causes of the dispute is evidence of strong counterpressures deriving from the structure of dispute institutions. *See, e.g.*, Gellhorn (1954: 163-65) (superficial inquiry into financial problems of a dissolving family unit).

355 The call for decentralization as a social panacea, for a return to small town virtues, can readily be illustrated from recent history.

356 This is, of course, a paraphrase of Weber's notions about the relationship between law and capitalism (*see* Trubek, 1972a). Weber saw the causal connection proceeding in the opposite direction; but to me this simply indicates that contradictions between social structure and dispute process generate pressure for changes in both phenomena.

357 This general development has frequently been observed during the last half century from a wide variety of viewpoints, (*see, e.g.*, Dahrendorf, 1959: Ch. 7; A. Douglas, 1957).

[358] Stratification is so much a part of contemporary western legal systems that participants in those systems are no longer able to recognize the fact that it exists and is increasing. Professor Maurice Rosenberg of Columbia Law School, the current president of the Association of American Law Schools, recently wrote a letter to the *New York Times* condemning the "niggardly" compensation paid to federal judges, and arguing that unless they were paid "just" compensation, good lawyers could not "in fairness to their families and themselves" afford to become judges. The present "niggardly" salary is $40,000-$42,500 a year. (*New York Times*, October 10, 1973: p. 46.) As this example shows, there are no pressures to reduce economic stratification. Rather, the demand is for greater representation of groups defined by ethnicity, religion, or sex — by the appointment of individuals who are immediately placed in the higher economic strata.

[359] An instructive example may be drawn from another legal institution, the legislature. During the past century, state legislatures have gradually been transformed from a collection of poorly paid amateurs, holding other full time jobs, and meeting only rarely, to professionals, acting nearly full time, who are demanding, and increasingly obtaining, adequate pay. Yet the structural changes required to meet the demands of the contemporary legislative process may not stop there, as the following article indicates:

> Congress, caught between multiplying problems and declining efficiency, may have reached a legislative absolute — the unpassable bill.
>
> Attempting to rewrite the entire Federal criminal code in one package, the lawmakers now face the possibility that a bill can be so long, so complex and so controversial that it cannot be processed with [sic] the two-year life span to which each Congress is limited.

Some structural change may be required by the size of the bill (538 pages), its controversial nature (issues such as capital punishment, abortion, the insanity defense, obscenity), and political sensitivity. But ironically, one such structural change — greater professionalization — may in fact be an obstacle to passage of the bill, for, as the article notes, "Lawyers make up to [sic] 54 per cent of the current Congress and 100 per cent of the two Judiciary Committees that have jurisdiction over the criminal code, and they take particular interest in carefully scrutinizing changes in the rules of their profession" (*New York Times*, July 16, 1973: p. 15).

[360] The suggestion that laymen, especially social scientists, be included in Catholic matrimonial tribunals, is an example (*see* note 354 *supra*); so is the demand for professional judges to preside over a dispute process transformed by the introduction of a written code, or by the participation of professional counsel.

[361] Judges often become personally involved in contested matrimonial actions, especially disputes over custody; evidence of this may be found in the degree of affect they exhibit from the bench, and in their frequent references to personal experience in passing judgment. *See, e.g.*, the extensive materials concerning the "Lesser" case in Goldstein and Katz (1965: 19-58, and especially 113-22). More recently, judges confronted with argumentative defendants in criminal trials have lost their self-control and thereby diminished the distance between judge and accused — which, of course, was precisely the intent of the defendant in the first place.

[362] The Conciliation Bureau of the New York Supreme Court, whose purpose was a full exploration of the problems underlying the divorce action, was recently abolished because few divorcing couples wanted such an exploration (Laws of New York 1973, Ch. 1034); on the reasons for the repeal, *see* Subcommittee on Legal Representation of Indigents and Limited Income Groups (1973: 10-12); and *New York Times*, June 2, 1973: p. 1.

[363] The most notable recent example has been the legal services lawyers who refuse to bargain pleas, or who raise affirmative defenses to eviction proceedings, thus placing intolerable burdens on institutions accustomed to routine bureaucratic processing.

[364] The champions of the rule of law are almost exclusively legal professionals (lawyers or judges), usually those who operate at the higher levels of legal institutions (appellate courts, the national legislature, the larger law firms, the professional associations). The ideology may be seen as an idealization of the process occurring within those institutions, which is then generalized as a value for a wide variety of other institutions which handle disputes, *e.g.*, prisons, schools, universities, etc.

[365] Of the four traditional professions, the clergy and the military have little salience as contemporary role models; law and medicine have increased in importance commensurately.

[366] A wealth of data on the way dispute processing preserves intimate relationships can be found in the genre known as the American Jewish novel, *e.g.*, Roth, Malamud, Bellow; this phenomenon may be general: certain kinds of disputing may be a principal mode of integration for all families. *See* Eisenstein (1956).

[367] Galanter has made this argument for the United States (1972b); Duncan Kennedy, following Furnivall (1956), has analyzed the colonial situation in similar terms.

[368] Here, again, I am turning Weber upside down (1958).

[369] This is Weber's theory that, in the modern era, authority tends to claim legitimation upon the basis of rationality, rather than by invocation of tradition or charisma (1947).

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Chapter 4. A Bibliography of the Customary Laws of Kenya (with special reference to the laws of wrongs)

This bibliography was developed in the course of research in the customary laws of wrongs in Kenya,* and is therefore most thorough with respect to that subject. However, the nature of customary law is such that wrongs do not form a sharply differentiated substantive area. Moreover, other bodies of law—e.g., those pertaining to the family, to property rights, to procedural matters—clearly bear on the treatment of wrongs. Consequently, most sources cover a broad subject matter, and in seeking to include all those having any bearing on the laws of wrongs, I believe I have been reasonably comprehensive. Two areas were deliberately excluded. Non-customary laws—received English law, adopted Indian Acts, Moslem or Hindu law—where it has no bearing on customary practices, is not referred to. Within customary law itself, the rules of land law have only been dealt with incidentally, for the area is sufficiently specialized to constitute a separable subject matter, with an extensive bibliography of its own. (See especially Sorrenson, M. P. K. *Land Reform in the Kikuyu Country: a study in Government Policy*, pp. 253–56. New York: Oxford Univ. P. for E. Afr. Inst. Soc. Res., 1967).

Two other invaluable resources for study should be mentioned here. The Kenya National Archives contain an extensive collection of the records of colonial administration: District and Provincial Political Record Books, Annual Reports, and Handing-over Reports. (See Government of Kenya, *Archives Microfilming Programme, Section I: Provincial and District Annual Reports*, 75 pp. and map. Cyclostyled.) These frequently include statements of substantive rules and procedures, as well as

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discussions of problems in administering customary law (e.g., whether or not to impose a statute of limitations). Much of this material has been microfilmed and stored in the Syracuse University Library, from which it may be borrowed. (See Fedha, Nathan and John B. Webster. *A Catalogue of the Kenya National Archives Collection on Microfilm at Syracuse University;* Syracuse: Programme of Eastern African Studies, 1967; Gregory, Robert G., Leon Spencer and Robert Maxon. *A Guide to the Kenya National Archives.* Syracuse: Programme of Eastern African Studies, forthcoming 1969.)

Second, the proceedings of the African Courts and of Appeals Magistrates (now District Magistrate's Courts) have been recorded for about a decade, generally in English but sometimes in Swahili. These reports include the testimony of parties and witnesses, a reasoned judgment, and the steps taken to execute it. They are filed in the highest court to have been seized of the case. In addition, Mr. T. A. Watts, while African Courts Officer (1963–67), collected about 5,000 copies of the judgments of Appeals Magistrates, which can now be consulted in the Law Courts, Nairobi.

Finally, several other bibliographies may assist the investigator:

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I have organized the bibliography as follows:

I. General Background

II. Judicial and Legal System—General
- A. Legislation
- B. Cases
- C. Official Reports
- D. Published Sources
- E. Unpublished Sources

III. Substantive Law—General
- A. Contracts and Commercial Law
- B. Criminal Law
- C. Family Law
- D. Inheritance and Succession
- E. Land Law

IV. Substantive Law—by Tribe
- A. Bantu
  1. Embu
  2. Gusii
  3. Kamba
  4. Kikuyu
  5. Kuria
  6. Luyia
  7. Meru
  8. Mijikenda
  9. Pokomo
  10. Samia
  11. Taita
  12. Taveta
- B. Nilotic—Luo
- C. Nilo-Hamitic
  1. General
  2. Elgeyo
  3. El Molo
  4. Iteso
  5. Kipsigis
  6. Kony
  7. Masai
  8. Nandi
  9. Pok
  10. Pokot
  11. Rendille
  12. Samburu
  13. Tugen
  14. Turkana
- D. Hamitic—Galla
- E. Aboriginal
  1. Dorobo
  2. Sanye
- F. Swahili

The only significant omission of a tribe is the Somali, the reason being that practically no one has studied the Somali of Kenya, whereas those of the Somali Republic (*q.v.*) have been extensively described. In organizing the data by tribal categories, I have included some brief information to help identify the tribe:

Name (with alternate spellings, and constituent groups) (Population according to the most recent census). Principal home districts.

Following usual practice, I have dropped prefixes from the tribal names, e.g., Bantu: wa-, a-, aba-; Nilotic: jo-; Nilo-Hamitic: el-.

In the references which follow I have used a number of abbreviations.

A.L.S./S.O.A.S.: African Law Section, School of Oriental and African Studies, Univ. of London.

Afr. Stud.: African Studies (formerly Bantu Studies)

Amer. Anthrop.: American Anthropologist

Beh. Sci.: Behavioural Science

Can. J. Afr. Stud.: Canadian Journal of African Studies

E. Afr. Ann.: East African Annual

E.A.I.S.R.: East African Institute of Social Research (now Makerere Institute of Social Research)

E.A.L.J.: East African Law Journal

E. Afr. Med. J.: East African Medical Journal

E. Afr. Prot. L. Rep.: East Africa Protectorate Law Reports

E. Afr. Q.: East African Quarterly

Geog. J.: Geographical Journal

H.M.S.O.: Her Majesty's Stationery Office

Hum. Org.: Human Organization

I.A.I.: International African Institute (formerly International Institute for African Languages and Cultures, I.I.A.L.C.)

I.I.A.L.C.: see I.A.I., *supra.*

J. Afr. Admin.: Journal of African Administration (later Journal of Local Administration Overseas)

J. Afr. Hist.: Journal of African History

J. Afr. Soc.: Journal of the African Society (later Journal of the Royal African Society, J. Roy. Afr. Soc.)

J. Anthrop. Inst.: Journal of the Anthropological Institute of Great Britain and Ireland (later Journal of the Royal Anthropological Institute of Great Britain and Ireland, J. Roy. Anthrop. Inst.)

J.E.A.U.N.H.S.: Journal of the East Africa and Uganda Natural History Society (sometimes Journal of the East Africa Natural History Society, J.E.A.N.H.S.)

J. Mod. Afr. Stud.: Journal of Modern African Studies

J. Roy, Anthrop. Inst.: see J. Anthrop. Inst., *supra.*

K.I.A.: Kenya Institute of Administration

R-L.I.: Rhodes-Livingstone Institute

R-L.J.: Rhodes-Livingstone Journal (also known as Human Problems in Central Africa)

S.O.A.S.: School of Oriental and African Studies, Univ. of London

Tang. Notes & Records: Tanganyika Notes and Records (later Tanzania Notes)

Ug. J.: Uganda Journal

Because the unpublished materials can only be consulted by persons able to travel to London or Kenya, I have listed them separately. All unpublished materials (except theses, which are filed at the degree-granting institution) are in the form of microfilm, and are at the A.L.S./S.O.A.S., unless otherwise noted.

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V. Addendum: 1969-1974

Research and publication on Africa generally, and on Kenya in particular, has enormously accelerated in the last decade. This addendum attempts to bring the preceding bibliography up to date by adding materials published in the last five years, and also those items published earlier but only discovered recently. Because it has been compiled in the United States, it will be more comprehensive for items published there, and less so for items published in England or Africa. Entries are arranged in the same order as above, and under the same topic headings, so as to facilitate cross-reference.

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Gulliver, P.H. "Nomadism among the Pastoral Turkana of Kenya: its natural and social environment," in Peter Rigby, ed. Society and Social Change in East Africa 30-41. Makerere: Nkanga Eds., 1969.

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VI. Kenya Case Materials

A. Statutes

1. All statutes governing the work of the local courts, 1897 - date.

2. All statutes defining the place of customary law, 1897 - date.

This includes, among other things, the following:

Native Courts Regulations, 1897
Courts Ord., 1907
Native Tribunal Rules, 1913
Native Tribunals Ord., 1930, and parliamentary debates.
Native Authority Ord., 1937.
African Courts Ord., 1951, and debates
African Courts (Amend.) Ord., 1962, and debates
Magistrate's Courts Act, 1967, and debates
Kadhi's Courts Act, 1967
Judicature Act, 1967
Jurisdiction of Courts Act, 1967
Abolition of Customary Crimes - Parliamentary Question, 3/10/67.
Criminal Law (Amendment) Act, 1969, and debates
Law of Succession Bill, 1970, and debates

B. Rules - all subsidiary legislation relating to the above, including:

Native Tribunals (later African Courts) (Fees and Fines) Rules - amended periodically
African Courts (Interrogation of Judgment Debtors) Rules, 1952, GN 987/52
African Courts (Lapsed Deposits) Rules, 1959, LN 38/59
African Courts (Dismissal of Land Suits) Rules, 1957, LN 181/57
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Native Affairs Department. Annual Reports, 1925-47
African Affairs Department. Annual Reports, 1948-57
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Standing Orders for African Courts (1956) (80 pp)
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Criminal Procedure Rules for African Courts (c. 1962-63) (23 pp. with three later amendments)
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Framing of Charges for Offences Hearable by African Courts (with amendments) (15 pp.) (From African Courts Handbook - ACH)
Waller, H. de Warrenne (African Courts Officer). A Guide to Evidence for African Courts (1961) (9 pp. with a later circular on the same subject) (from ACH)
(Chief Accountant and African Courts Officer). Notes for the Assistance of Checking Officers. (1962) (4 pp.)
African Courts Officer. Guide to Hearing of Civil Appeals by District Officers. (1951) (5 pp.) from ACH)
Thompson, W.H. (Acting African Courts Officer). African Courts Administrative Instructions (1963) (4 pp.)
Courts Empowered to Make Probation Orders
Courts Empowered to Administer Corporal Punishment
Statutory Law for African Courts (1960) (from ACH)
Offences Which Can be Heard by African Courts, with the Courts listed for each offence (1963) (from ACH)
A Guide to Following the Law in Adjudication, Land Consolidation and Enclosure for Registration. (35 pp.)

African Courts Officer. Circulars to African Courts (1962-63)
1/62: Confirmations; right of appeal; revision; inspection
3/62: Confirmations of sentences of imprisonment or detention

4/62: Sale of property after attachment or distraint; inter-clan land disputes; model criminal case files.
6/62: Proforma for a bond under ACO s. 18 (1c)
7/62: Fingerprinting for previous convictions
1/63: Disposal of case files; suits in forma pauperis
2/63: Amendments to Guide for Evidence; advice in appeal judgments; suits in forma pauperis
3/63: Trespass Ordinance
4/63: African Courts (Amendment) Ordinance, 1962
5/63: Confirmation and revision of African Court cases
6/63: Repeal of Circular 1/62
7/63: Monthly returns
8/63: Service of process in Uganda and Tanganyika
9/63: Trespass Ordinance

Magistrate's Courts - Forms (post-1967)
Chamber summons
Decision in Appeal
Application for execution
Order to attach salary of public office
Notification of sale of immovable property
Warrant of commital of judgment debtor to jail
Civil complaint (1967)
Civil complaint (1970)

E. Administrative records

Political record books of the DO, DC, and PC, from the Kenya Archives. Very incomplete.

F. Kenya Restatement Project and Law Panel Minutes

1. Structure and administration of the restatement project
   a. composition of law panels
   b. purpose of project
   c. means of achieving unification

2. Complete law panel minutes for every tribe on the subjects of:
   a. marriage and divorce)
   b. succession and inheritance) (several hundred pages)
   c. customary crimes)

G. Cases

1. High Court (Supreme Court) and East African Court of Appeal - all reported cases relating to customary law and the primary courts. Several hundred cases altogether.

2. Court of Review
   a. Law Reports, vols. I-X (1953-62) (all published reports)
   b. Unpublished cases, 1963-66 (twenty-four).

3. Local courts - African Courts and Appeals Magistrates. All African Court cases are for 1966: most Appeals Magistrates decisions are from that year, but some are from 1963-67. The following is a list, by province, district and court, of the number of cases I have for each court. All cases are civil cases, unless designated as criminal. Most civil cases deal with wrongs, broadly conceived, and comprise about 40-50% of the total caseload for the year.

Western Province	total	858
Kakemega District		
Lurambi AC (Kakamega township)		131
Kakamega DAC Criminal cases		89
Hamisi AC		114
Emuhaya		50
Khvisero AC		39
Mumias AC		92
Kakamega Appeals Mag		129
Bungoma/Busia District		
Bungoma DAC		46
Bungoma DAC Criminal cases		28
Nambale AC		73
Bungoma Appeals Mag.		67
Eastern Province	total	751
Machakos District		
Iveti (Machakos DAC)		143
Machakos DAC Criminal cases		96
Machakos Appeals Mag.		178
Kitui District		
Kitui Appeals Magistrate		36
Embu District		
Embu Appeals Magistrate		18
Meru District		
Meru Appeals Magistrate		280

Nyanza Province	total	917
Central Nyanza District		
Winam (Kismu) DAC		102
Kisumu DAC Criminal cases		67
Maseno AC		79
Maseno AC Criminal cases		57
Kisumu Appeals Magistrate		109
South Nyanza District		
Doho Kosele AC		37
Doho Kosele AC Criminal cases		21
Bura Rongo AC		42
Homa Bay Appeals Mag.		57
Kisii District		
Kisii DAC		129
Kisii DAC Criminal cases		112
Kisii Appeals Mag.		105
Central Province	total	953
Kiambu District		
Kiambu DAC		185
Kiambu DAC Criminal cases		142
Kiambu Appeals Mag.		229
Thika District		
Thika Appeals Mag.		2
Murang'a District (Fort Hall)		
Murang'a Appeals Mag.		224
Nyeri District		
Nyeri Appeals Mag.		134
Kerugoya District		
Kerugoya Appeals Mag.		37
Rift Valley Province	total	296
Kipsigis District		
Kericho DAC		129
Kericho DAC Criminal cases		37
Sotik AC		41
Kericho Appeals Magistrate		32
Nandi District		
Kapsabet AC		40
Eldoret Appeals Magistrate		17
Coast Province	total	236
Kwale District		
Gwirani (Gazi) AC		33
Kinango (Kwale) AC		96
Kwale Appeals Mag.		10

Kilifi District		
Kilifi AC		55
Kaloleni AC		23
Kilifi Appeals Magistrate		9
Urban Courts	total	116
Nairobi		
Makadara AC		28
Mombasa		
Tononoka AC		87
Mombasa Appeals Mag.		1
	Grand Total	4229

II. Informal, extra-judicial dispute processes - data from research assistants.

1. Donald W. Kaniaru - South Tetu location, Nyeri District, Approximately two hundred cases:

   a. Mukurweini District Magistrate's Court (1968) - civil cases. Very detailed accounts of testimony, recorded by Kaniaru, supplemented by interviews with the parties or their witnesses.
   b. Cases heard by elders (kiama)

2. Luke Wasambo-Were - East Gem location, Central Nyanza
   Approximately fifty cases:
   a. Land Adjudication Committee, Nyawara sublocation.
   b. Sub-chief's baraza
   c. Maseno District Magistrate's Court - mostly criminal cases. (1968)

3. Robert Agufa-Endusa - North Maragoli location, Kakamega District
   Approximately one hundred cases:
   a. Mbale District Magistrate's Court (1968) - criminal
   b. Hamisi District Magistrate's Court (1968) - civil
   c. Cases heard by elders (magutu)
   d. Cases heard by the sub-chief

4. Tom Mbaluto - Iveti location, Machakos District
   1. Informal dispute processes
   2. Administration of the kithitu oath
   3. Resident Magistrate's Court, Machakos

5. John C.N. Otula - East Karachuonyo location, South Nyanza Dist.
   Approximately one hundred cases
   a. Doho Kosele District Magistrate's Court - (1968) - civil and criminal cases supplemented by discussions with litigants and witnesses
   b. Cases heard by clan elders
   c. Cases heard by sub-chief

I. Statistical Data

A. National Statistics

1. Cases filed, all of Kenya, 1927-69, broken down by civil and criminal

   a. National total
   b. By district and province

2. Average population served by a primary court

   a. by tribal district (all districts)
   b. by year, for the two years 1943, 1967

3. Cost of Litigation

   a. Schedule of fees for courts

      (1) by the service rendered
      (2) by year, 1931-61 span, with some intervening years missing. (fees remained relatively constant after 1961)

   b. Actual cost of litigation in one court, for impregnating an unmarried girl, and for damaging crops and trees, for 1948 and 1966

      (1) average fee
      (2) total fees paid for this type of case
      (3) average claim
      (4) total of claims made for this type of case
      (5) fee/claim ratio

4. Duration of Litigation

   a. Average length of time from filing to judgment - civil cases - Kiambu, 1948 and 1966; Machakos 1966, for nine different kinds of cases.

b. Average length of time from offence to arrest, and from arrest to judgment, for two courts, for each of four offences, 1966.

5. Ratio of criminal prosecutions to civil cases, for six courts, 1966, total, assault, and theft.

6. Kinds of cases filed

a. Comprehensive tabulation of all cases filed in the primary courts and first level of appellate courts of Kenya for 1966, by court, broken down by the following type of case:

(1) customary crimes
(2) crimes under the Penal Code
theft and other forms of taking
assault and other forms of intentional injury
sexual offences
(3) Offences under the Witchcraft Act
(4) Total criminal prosecutions (including those under administrative regulations)
(5) Total civil, broken down by:

land
actions under the Affiliation Act
other civil

(6) Total cases filed

b. Comprehensive tabulation of all cases filed in all courts of Kenya, 1967-69 inclusive, broken down by court, and by type: criminal, traffic, civil, and land.

B. Statistics for individual courts

1. Civil wrongs

a. Comprehensive analysis of all cases of civil wrongs filed in the primary courts in 1966, for the following courts (with tribe) (and number of cases analyzed):

Gwirani (Digo) (38)
Iveti (Kamba) (192)
Kinango (Duruma)
Kaloleni (Giriama)
Kilifi (Giriama)
Wundanyi (Taita)
Kericho (Kipsigis) (152)
Sotik (Kipsigis) (62)
Kakamega (Luyia) (157)
Mumias (Luyia Wanga) (152)
Maseno (Luo) (143)
Doho Kosele (Luo) (62)
Hamisi (Luyia Tiriki) (119)
Kisii (Gusii) (216)
Kiambu (Kikuyu) (289)
Kilungu (Kamba)

b. Analysis of civil wrongs filed in primary court in 1948, for the following court (with tribe): Kiambu (Kikuyu)
c. For the above, I have most, if not all, of the following information for civil cases:

(1) Characteristics of the parties:

sex
residence - by village, sublocation, location
religion
literacy
occupation

(2) Cause of action
(3) Relief claimed: amount, if in money; or other remedy
(4) Relief awarded
(5) Whether judgment by default; whether or not set aside
(6) Court costs: total, sometimes broken down by purpose, party
(7) Chronology

date of the incident
filing date
judgment date
date of motions in furtherance of execution
dates of payments made in satisfaction of judgment

2. Criminal Prosecutions

a. Analysis of criminal prosecutions involving wrongs filed in the primary courts in 1966, for the following courts (with tribe):

(1) Kiambu (Kikuyu) (complete)
(2) Machakos (Kamba) (partial)

b. For criminal cases, I have most, if not all, of the following information:

(1) Statute under which the case is prosecuted

(2) Characteristics of the parties (complainant, accused)

Whether child or adult
sex
co-residence

(3) Characteristics of the offence

date
time
place

(4) Chronology

number of days from offence to arrest
" " " " arrest to trial (and judgment - always the same day)

(5) Whether accused held in custody
(6) Plea
(7) Disposition
(8) Statements in mitigation or aggravation

by accused
by prosecution

(9) Prior record

(10) Sentence

fine - amount
detention camp or EMPE in default of fine - number of days
detention camp - number of days
prison - number of days
conditional discharge
corporal punishment - number of strokes

For theft cases, I have in addition:

(11) characteristics of article stolen
(12) value of article stolen
(13) whether article returned to complainant
(14) Whether accused intoxicated at the time
(15) Weapon used:

fists
stick or rungu (heavy walking stick)
knife or scissors
panga (machete)
iron bar
other

Appendix. Published Articles and Reviews

BOOKS

Reviewed

Law Books and Books About Law*

Richard L. Abel†

MARRIAGE STABILITY, DIVORCE, AND THE LAW. By Max Rheinstein. Chicago: University of Chicago Press. 1972. xi + 482 pages. $17.50.

What is the difference between a law book and a book about law? Does the insertion of a preposition change the nature of the intellectual enterprise in a significant way? I believe it does, and that the latter endeavor demands a radical shift in our thinking. Books about law are increasing in number; indeed, it has almost become de rigueur to claim allegiance to this new style in scholarship. Unfortunately, there appears to be considerable confusion about the nature of the distinction and the consequences of choosing to write a book about law rather than a law book. This essay is one of many similar efforts to clarify the path of studies about law in order to advance them.[1]

A law book, as I use the term, is a work of legal doctrine. It is a study of the rules which legal institutions apply, or which regulate the behavior of those institutions. The study identifies, defines, organizes, and criticizes the rules by means of criteria proper to the legal system—it *rationalizes* them in Weber's sense.[2] The mode of rationalization need not be wholly internal to the legal system—it may, for instance, connect the rule with some social goal—but the relationship between that goal and the legal rule is the product of a mental operation peculiar to law.[3] Legal rationalization is thus another form of professional activity within the legal system—like

* I am grateful for the criticism of John Griffiths, John Modell, the members of the seminar in Comparative Legal Sociology, held at Yale Law School in the fall of 1972, and David Trubek, who taught that seminar with me.

† B.A. 1962, Harvard College; J.D. 1965, Columbia Law School. Associate Professor of Law, Yale University.

1. *See, e.g.*, M. Galanter, Notes on the Future of Social Research on Law, April 1973 (paper presented to the Conference on Developments in Law and Social Science Research, held at the University of North Carolina); Black, *The Boundaries of Legal Sociology*, 81 YALE L.J. 1086 (1972); Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972). Such programmatic efforts are hardly new; indeed, they largely reiterate similar statements by the legal realists in the 1930's. *See, e.g.*, Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431 (1930).

2. *See* MAX WEBER ON LAW IN ECONOMY AND SOCIETY 61 (M. Rheinstein ed. 1954).

3. There are excellent examples of such purposive rationalization in Pashko v. Pashko, 45 Ohio Op. 498, 101 N.E.2d 804 (C.P. 1951), and Hawkins v. United States, 358 U.S. 74 (1958). These cases are reproduced in J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW 131, 354 (1965).

adjudication, or advocacy, or counseling.[4] All professional activity is shaped by external pressures—by the demands of the legal system, or of the larger society in which it is situated. This hardly needs to be stated of the work of the practicing lawyer, or of the legislator, administrator, or judge, each of whom is an active participant in a functioning legal system. We may have to be reminded, however, that legal educators, though now operating within a university environment, are similarly directed; law schools invariably characterize their mission as one of teaching each student to "think like a lawyer";[5] success and failure are phrased in such terms as "lawyerly" and "unlawyerlike" behavior. Most important for my argument, the legal scholarship which produces law books is also a response to the demands of a functioning legal system.

By contrast, a book about law is a mode of *reflection* upon the legal system. Neither legal training nor professional competence is adequate qualification to write about the legal system, any more than an Olympic swimmer or leading opera singer is qualified to explain the hydrodynamics of swimming or the physiology of singing. This is not to deny that practice of a professional skill permits unique insight into the skill, but understanding is a different matter. For this reason, efforts to understand legal action have borrowed the perspectives of other intellectual disciplines; the social sciences and the humanities have all been used to illuminate legal phenomena. Within the social sciences, and particularly within sociology, we have recently seen the tentative development of a social theory of law.[6] Although these several studies diverge in method, they share among themselves a common difference from law books: their objectives lie outside the legal system. The central question thus becomes: what is the nature of the understanding they seek, and how do we acquire it?

Max Rheinstein explicitly proclaims that his important book, *Marriage Stability, Divorce, and the Law*, reaches beyond narrow professionalism toward a different kind of understanding: "This book is not a 'law book' but a book about law, about law, that is, in its impact on life. It is meant as an inquiry into the facts of life and an attempt to pave the way to an informed discussion of what, if anything, might or ought to be done."[7] The title Rheinstein has chosen links a social fact—marriage stability—to a legal process—divorce—and a set of behavioral standards—the law. The study was executed by methods appropriate to its interdisciplinary nature: schol-

4. This characterization of legal rationalization has been developed with great clarity and force by Vilhelm Aubert in his *Introduction* to SOCIOLOGY OF LAW 9–14 (V. Aubert ed. 1969).

5. *See, e.g.*, STANFORD LAW SCHOOL, PROGRAMS OF STUDY, 1972–73, at 6 (Stanford University Bulletin, Ser. 26, No. 7, 1972): "The courses, materials, and teaching approach in the first year are designed to develop in each student a beginning grasp of some of the basic intellectual attributes which characterize the first-class, well-educated lawyer."

6. *See* note 1 *supra*.

7. P. 7.

ars from a variety of disciplines collaborated over two decades to bring together data concerning legal and social phenomena in many countries during different historical periods.

This Review is a critical examination of the extent to which Rheinstein has written a book about law. Since interdisciplinary studies have not yet agreed upon the criteria by which they should be judged, I have drawn upon the standards of more established disciplines. I organize my critique in terms of several distinct intellectual operations which, whether explicitly recognized or not, are necessarily involved in any social analysis. Although the operations shade into one another, they can be roughly demarcated as the selection of values, the development of theory, the application of a method to test propositions drawn from that theory, and the advocacy of policy. By the values of a study I mean those assumptions, factual or normative, generally unstated, that establish the most basic general boundaries for the study. Values may become theories when these assumptions are stated explicitly and subjected to analysis and reconsideration. The more general statements of theory are in turn translated into more concrete propositions according to notions of what constitutes an adequate explanation, which dictate the choice of methodology. Finally, the study may be used as the basis for policy recommendations which either express the author's values, or derive from his empirical investigation and are framed as testable propositions about change. In what follows I have tried to assess Rheinstein's study according to the criteria appropriate to each of these operations.

I. Values

It is not necessary to enter the interminable wrangle over the possibility, or desirability, of value-free social science in order to maintain that an author's values influence his inquiry at many points, including his decisions about what is worth studying, how to study it—the definition of the problem, the kind of explanation or understanding to seek, the concepts to use, the facts to examine for potential explanations—and what policy recommendations to make. Because I believe in the subjectivity of values, I do not presume to criticize those that guide another; the exposition of Rheinstein's values which follows should not be read as an attempt to denigrate them, although my own do differ significantly. At the same time, however, the influence of values upon any inquiry may render its conclusions uninteresting to those whose values differ, even though the findings satisfy accepted criteria for verification.[8] It is this characteristic of social science

8. Dahrendorf makes a very similar comment with respect to what he calls "meta-theoretical" decisions: "It is difficult to examine 'basic attitudes' of scientific analysis with respect to their useful-

that moves me to analyze Rheinstein's values, which, while not made explicit, are also not concealed beneath a facade of value-neutrality.[9]

A. *The American Family*

Rheinstein elaborates the concepts in his title in a clear statement about the focus of his interest:

> Some marriages collapse; in fact a great many do. And when a marriage collapses, problems arise, for the spouses, their children, and the community. Hopes are dashed, a home is destroyed, and with it the economic basis of a family. Readjustments must be made, children have to be taken care of, wounds should be prevented from festering.[10]
>
> My interest in the relationship between marriage stability and the law of divorce grew out of my membership in the Interprofessional Commission on Marriage and Divorce . . . [which] was expected to draft the model law that would protect the American family from threatened ruin.[11]

Although Rheinstein later came to doubt the capacity of law to accomplish that goal, he never abandoned the goal itself: "Marriages, at least most of them, are still intended to be for life. 'We take each other to love and to cherish, in sickness and health, for better, for worse, until death do us part.' Even where this time-honored formula of the Christian marriage ritual is not used, the parties expect, or hope, that their marriage will last."[12] The family which this matrimonial bond unites is an idealization[13] of the white, religious, middle class family of an earlier era,[14] consisting of two parents,

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ness. The question of empirical rightness or wrongness does not apply to them. . . . We are dealing here with 'meta-theoretical' decisions which determine the direction of analysis with respect to specific problems without being part of this analysis themselves. Their test is their analytical fruitfulness and not their empirical correctness or logical soundness." R. DAHRENDORF, CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY 112–13 (1959).

9. *Cf.* W. GOODE, WOMEN IN DIVORCE at ix (1965): "Good research procedures prevent any personal bias of the researcher from 'making the data conform to one's prejudices.' Since, nevertheless, the subject is emotionally loaded, it may be useful to the reader if the author gives what may be his own most pertinent layman's prejudice, relative to divorce."

My own values can be stated briefly. They grow out of the experience of practicing family law for a year with the New Haven Legal Assistance Association. I would prefer that the state interfere as little as possible with the decision of one or both married partners to obtain a divorce. Once that decision is made, however, I believe that the state should perform two functions. First, it should participate in the decision about the future of any children of the marriage, although existing mechanisms for determining the "best interests of the child" do nothing of the sort. Second, it should help to correct the economic imbalance present in almost every marriage, caused by the disadvantaged position of women in our society, and the failure of the society or the state to provide adequate assistance in childrearing.

10. P. 3.

11. P. viii.

12. P. 3. There is considerable ambiguity here as to whose views are being expressed—is it a consensus of contemporary morality, or the doctrines of Christianity, or a view of the past? No empirical evidence is offered to connect these values with any of those sources; the speaker can only be Rheinstein himself.

13. *See* Rodman, *The Textbook World of Family Sociology*, 12 SOCIAL PROB. 449 (1965).

14. It is clearly not the black American family, or the poor white family: "[Among American Negroes, under conditions of slavery] a feeling for the sanctity or indissolubility of marriage could

legally bound in lifelong monogamy, obeying a mandate of strict sexual fidelity, economically self-sufficient, raising their children in their own home.

Such notions of family stability and marriage stability pervade and shape the book. But it is critically important to recognize that the aura of value-neutrality which surrounds them is deceptive: marriage and family are not benchmarks with an agreed content—like absolute zero, or a circle—from which departures can be observed with scientific objectivity. Rheinstein's personal values have influenced his choice and definition of concepts. Only those values can explain why American Negro marriage is measured against the criteria of the white middle class but the inverse judgment is never made. Clarity would be served by substituting "white middle class ideals" wherever the concept of marriage or family appears.

For the same reasons that these ideals are valued, sexual relationships unconsecrated by formal marriage are condemned. Irregular unions not celebrated according to the forms of church or state, and irregular dissolutions, are disfavored.[15] Rheinstein believes that adult sexual relationships are too important to be left to the parties. The Soviet Union, in its early revolutionary zeal, expected the state to wither away and cease regulating family relations; but with greater "maturity" this dream has been discarded, and Rheinstein cannot quite hide his glee at the embourgeoisment of communist marriage.[16] Contemporary Swedish experiments with a radical legal reform which would tend to equalize alternative family structures are treated with a skepticism which seems to me to be grounded in disapproval.[17]

Rheinstein's criticism also extends to concubinage, prostitution, polygamy—whether simultaneous or serial—infidelity, abandonment, and separation. Consistent with the class attitudes discussed earlier, he sees these vices as traits of either the brutalized proletariat or the degenerate aristocracy:

> Family instability has been characteristic of the lowest status groups of society: American Negroes, London East-Enders, Paris *clochards*, the "Lumpenproletariat" of Berlin-Wedding. . . . The bond of marriage is taken the least seriously by those groups which are so low on the social ladder that their behavior patterns are irrelevant to the guardians of respectability. The bottom groups are those among whom the irregular union is a regular phenomenon.[18]

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not develop. It remained comparatively weak after the abolition of slavery, just as it has been weak among white proletarians the world over." P. 411.

15. Pp. 275, 313.

16. "Informal marriage is no longer possible. More and more marriages are concluded not in the perfunctory way and the dingy rooms of the registrar of civil status, but in an impressive, although simple, ceremony conducted in the cheerful atmosphere of a 'marriage palace.'" P. 239.

17. Pp. 156–57.

18. P. 422.

At the opposite end of the social spectrum, the French nobility of the *ancien régime* had equally little respect for the ideal of the family:

> [F]ollowing the model set by the kings, especially Louis XV, the usufructuaries of the major part of the nation's wealth engaged in conspicuous orgies of consumptive luxury and of sex. The Christian command against seeking carnal pleasures outside the lawful wedlock was disregarded by the men, unmarried and married, and widely loosened for the women. Marriage might be indissoluble, but it was far from being the *remedium concupiscentiae*.[19]

The "average" man, *l'homme moyen sensuel*, is contrasted favorably with these two extremes. "Christian marriage certainly was a living reality in the bourgeois middle class that was steadily increasing in number, wealth, and national importance."[20]

Rheinstein is able to discover his ideals embodied as a "living reality" in the 18th-century French bourgeois family only by limiting his view to the outward forms of family structure. Here, as throughout the book, he makes it clear that he is not interested in the content of human relationships. On the rare occasions when the issue arises he carefully skirts it. Writing of institutionalized day care in the Soviet Union, he observes: "By freeing the mother for gainful outside work it decreases the financial dependency of wives upon their husbands and may thus remove an inhibition against the breaking up of a marriage which might otherwise be endured." He then adds cautiously: "Whether such endurance would be socially desirable is, of course, a different question."[21] It is a question which many would think more important, but it is a question which is never discussed.

B. *The Nature of Man*

Complementing Rheinstein's ideal of the family is his belief that powerful psychological forces inherent in human nature tend to undermine that ideal: "Infidelity, abandonment, and separation have never been fully eliminated nor is there a chance that they ever will be."[22] Male family behavior is dominated by limitless sexuality; female sexual desires appear to be less threatening to the family, though it is not clear whether Rheinstein sees them as physiologically less compelling or as subject to greater social and cultural restraint. Men inevitably seek a variety of sexual objects in addition to their spouses; women to some extent sublimate sexual passion in platonic attachments and religion.[23]

Compounding this sexual drive is a fundamental aversion to any social

19. P. 199.
20. Pp. 198–99.
21. P. 425.
22. P. 408.
23. *See* text accompanying note 73 *infra*. *See also* p. 160.

restraint upon its free expression. Rheinstein finds evidence for this tendency under the most diverse circumstances. "Even in ancient Babylonia we are told of the custom of simply walking out on a distasteful marriage so as to avoid the high fee of a formal divorce, a custom which Urukagina, ruler of Lagash, tried to abolish in 2470 B.C."[24] He offers a similar explanation for the consequences of the Russian revolution: "[T]he anarchist element of Marxism was attractive. If it was no longer necessary, in order to get married, to go before and pay the priest, why should one go to and pay the registrar?"[25] Because of this essential lawlessness, any loosening of the reins is viewed as dangerous, partly because it is almost impossible to reverse the trend and reimpose limits once they are removed. For example, conservative reaction to the excesses of the French Revolution was unable to withdraw from the people the right to divorce:

> Portalis, the most influential of the four principal draftsmen [of the Napoleonic Code], openly expressed his aversion against the institution of divorce; he recognized, however, that it was too late to deprive Frenchmen of it, since they had had it for ten years. Bonaparte was convinced that divorce could not be completely abolished.[26]

Furthermore, even the most cautious liberalization will generate pressure for easier divorce.[27]

Although Rheinstein's outlook is thus extremely pessimistic, he sees man as endowed with another characteristic which has, until now, offered reason for hope: the capacity to see himself as evil, to be conscious of his essential sinfulness, and thus accept the need for external controls to reinforce his own self-restraint. For several millenia this consciousness has been maintained by the great world religions, but Rheinstein fears that it is dissolving under the onslaughts of popular hedonism. The intensity of these fears is revealed in the most explicit statements of value to be found in the book:

> That Western society is undergoing profound change is generally recognized today, with or without approval, with or without misgivings. A conspicuous feature of this change in cultural climate is the greater permissiveness of society toward once proscribed lines of individual conduct. . . . [T]he apprehension of social collapse through pluralism has been waning in the democratic nations. Freedom from restraints is postulated for every kind of conduct . . . . open expression of

24. Pp. 407–08.
25. P. 224.
26. P. 209.
27. Rheinstein believes that the premonitions of Italian conservatives and the strategy of liberals were both based on an accurate perception of social phenomena: "The forces of tradition rightly understood that divorce on the large scale would follow inevitably once the door was opened to the tabooed institution. . . .
". . . .
". . . The 'little divorce' (*piccolo divorzio*) had been meant to constitute the wedge to open the door for divorce on a more generous scale." Pp. 188–89, 191.

> social dissent, homosexuality, pornography, abortion, etc., freedom of remarriage . . . .
>
> . . . .
>
> . . . The new rise of the divorce rates coincides with the emergence of other elements of the new social climate, such as the New Left, youth culture, social protest, women's liberation, the new attitudes toward sex, hippiedom, drug use, and crime in the streets.[28]
>
> Dissatisfied people are the most dangerous to peace, political and domestic. Both revolution and marital disharmony thrive on dissatisfaction. More human needs are fulfilled in our time than ever before. Yet dissatisfaction seems also to be more general and more intense. The very fulfillment of once pressing needs has made expectations run ahead of reality. A utopian society free from war and authority, is sincerely believed to be achievable by sinful men. . . . So the victims of progressive education take to flight into the escapist realms of drugs, sex, flower power, pacifism, extraparliamentary opposition, romanticism—realms in which lasting satisfaction is not to be found. The hard ways of discipline, self-restraint, acceptance of fate immutable by man, these solely effective ways to find satisfaction here on earth, are disdained. If marital breakdown has indeed come to be more frequent than in the past, here seems to lie the principal cause.[29]

This erosion of man's sense of sin disables religion from instilling and supporting individual self-restraint. If man's evil nature is not to reign supreme, it is necessary to look to other methods of control.

C. *State Control*

Upon the default of religion, Rheinstein turns to the state. Perhaps the most fundamental assumption underlying the entire study is his belief that the state should intervene in family relations. Such intervention Rheinstein thinks proper not only to alter the choices a person might make in pursuit of his values by adjusting the social or economic costs of the alternatives through some legal or administrative apparatus, but also to alter those values themselves through education at an early age and counseling later. Given this assumption, which is never questioned, the inquiry is narrowed to the appropriateness of various modes of state intervention in different circumstances.

II. THEORY

A. *Rheinstein's Definition of the Problem*

Rheinstein defines the central problem of his study as how "to eliminate or reduce the temptation toward marriage breakup which exists in certain specific situations. What are these situations? How might the injurious elements be removed from them?"[30] Although we should never pretend

28. P. 311.
29. P. 428.
30. P. 412.

to know another's motives with anything like certainty, the congruence between Rheinstein's values and his definition of the problem is surely remarkable. He chooses to explore the causes of breakdown in a particular configuration of marriage and the family—namely, lifelong monogamy—rather than investigate the social variables associated with each of the observable family structures—such as serial polygamy, cohabitation without marriage, marriage without cohabitation, etc.[31]

His values are also consistent with the way he goes about solving the problem. The number of conceivable solutions to any problem, of course, is very large; no scholar can explore them all simultaneously. Among the numerous possible explanations for marriage stability, Rheinstein decides to look at the law: "[T]he changes that the law of divorce is undergoing are indeed sensational. . . . How has all this change come about? What does it signify? How will it affect the stability of marriage, the family, and the home? These are the problems which are treated in this book."[32] Rheinstein seems to have been drawn to this formulation by a rather naïve faith in the efficacy of law to control behavior: "Repression through deterrence worked fairly well, although never completely, in the comparatively static world of pre-industrial society."[33] But as he explored the historical and contemporary sociological evidence, he was forced to conclude that law has often been violated, consciously and successfully:

> Experienced observers have long known what we have laboriously tried in this book to prove, namely, that a strict statute law of divorce is not an effective means to prevent or even to reduce the incidence of marriage breakdown. In spite of the facts the old belief is still held widely among the public as well as among lawyers.[34]

One would expect to find such a radical change in basic approach at the beginning of the book, not at the end, a foundation for the study, not an afterthought which nullifies much of its significance. Once Rheinstein had found his assumptions to be in error, why did he not turn to a systematic exploration of other factors that might affect marriage stability? I would suggest that legal professionals, with their strong and obvious commitment to the importance of law, are clearly the last people likely to accept its irrelevance. Instead of doing so, they will make that *irrelevance* the central problem.

This is precisely what Rheinstein does. Having recognized that law no longer deters marriage breakdown, he nevertheless writes: "This book

31. A number of writers have recently commented on the unfortunate consequences for the development of theory of this single-minded focus upon the family established by lifelong monogamy. *See, e.g.*, Adams, *An Inquiry into the Nature of the Family*, in FAMILY IN TRANSITION 72 (A. Skolnick & J. Skolnick eds. 1971); Skolnick & Skolnick, *Rethinking the Family*, in *id.* at 1.

32. Pp. vii–viii.

33. P. 3.

34. P. 406.

is . . . about law, about law, that is, in its impact on life . . . . Among the facts of life, the law is one of importance even when it is flouted."[35] Laws that are flouted can have an "impact on life" in a number of ways: they can create deviance and give it shape;[36] they can express values and thus offer an arena for status competition.[37] But Rheinstein is not primarily interested in either of these phenomena; rather, he is preoccupied with the difference between law and behavior, which he characterizes as a form of hypocrisy. He writes with obvious admiration of "Scandinavia, where literature, theology, and philosophy united in calling for truthfulness and sincerity in all walks of life."[38] He cannot conceal his irritation at the pervasive divergences between law and practice found elsewhere; twice, in three pages, he is drawn to characterize such laws as inane—a word not commonly found in the vocabulary of either the legal scholar or the social scientist.[39] Throughout he contrasts favorably those countries where the deviation is small—Japan, Sweden, and now England, Germany, and certain American states—with others where it is large—Italy and France, other American states, and the Soviet Union. Among the latter, he looks hopefully for signs of change which "may succeed in eliminating or at least reducing the conflict between the law of the books and the law in action."[40]

B. *Legal Thought and the "Gap Problem"*

Although Rheinstein's personal constellation of values may be seen as contributing to his definition of the problem as the dissonance between law and behavior—what he, in a chapter heading, calls "Our Dual Law of Divorce: The Law of the Books and the Law in Action"[41]—still his choice is not unexpected. I think it fair to say that this dissonance, which I will call the "gap problem," has become *the* problem for books about law.[42] Some approach it as an issue of the effectiveness of a legal system (as in studies of "penetration" in developing countries);[43] others as a question of the degree of conformity with Supreme Court decisions or legislation (so-called "impact" studies);[44] others as threatening the wholesale nullification

35. P. 7.
36. This is the foundation of one school of deviance studies; an outstanding example of the school is K. ERIKSON, WAYWARD PURITANS (1966).
37. The concept of status competition as an explanation for the passage of laws which are never enforced has been developed most extensively in J. GUSFIELD, SYMBOLIC CRUSADE (1963).
38. P. 134.
39. Pp. 351, 353.
40. P. 352.
41. P. 51.
42. Donald Black has made this point cogently. *See* Black, *supra* note 1.
43. For critical discussions of the literature concerning penetration, see Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11 (1969); Trubek, *supra* note 1.
44. *See, e.g.*, T. BECKER & M. FEELEY, THE IMPACT OF SUPREME COURT DECISIONS (2d ed. 1973); Becker, *On Science, Political Science and Law*, 7 AM. BEHAVIORAL SCIENTIST, Dec. 1963, at 11; Nagel, *Some New Concerns of Legal Process Research Within Political Science*, 6 L. & SOC'Y REV. 9 (1971).

of law (as in the recommendations by liberal lawyers and other policy-makers for reform of sumptuary laws);[45] and still others as a jurisprudential issue (legal realism and sociological jurisprudence).[46] I think it is important to ask why the gap is seen as a problem, both because that perception is so pervasive in books about law, and also because it directs their focus in such a significant way.

We must begin by recognizing that to characterize the difference between law and behavior as a gap, and to see that gap as a problem, is to make a choice, even if not a conscious one. Why should we expect harmony between law and behavior rather than some other relationship—dissonance, for instance, or a purely accidental conjunction? I believe that the expectation of harmony is an element of the dominant mode of legal rationalization. By "rationalization" I refer to two distinct but related phenomena.[47] Any system of thought must have its own internal organization and coherence; when its practitioners—in this case legal professionals—are specialized and undergo lengthy training, we can anticipate a high degree of organization. If, in addition, the system of thought constitutes a justification for social action involving the exercise of power—a preeminent characteristic of legal thought—the rationalization will grow in importance and therefore in complexity.

Other modes of rationalizing legal thought and action did not lead to a perception of the gap as a problem. When, for instance, law was seen as the disconnected pronouncements of a lawgiver justified by his charismatic authority or by tradition (*i.e.*, formally or substantively irrational),[48] the expectation, if any, was that the relationship between law and behavior would be purely accidental. When law was seen as the application of a seamless, comprehensive body of abstract legal propositions by means of a uniquely legal logic (formally rational),[49] the expectation, if any, was that law and behavior would be inconsistent. But contemporary Western legal thought and action rest upon an ideology of purposive rationality—they are organized in terms of the purposes they serve, and justified by their ability to serve those purposes. The full implication of these differences is far too complex to analyze here; nevertheless, I hope that a necessarily superficial investigation of the implications of these ideal types of legal rationalization may help to illuminate the genesis of the gap problem.

The last hundred years of Western legal thought can crudely be summarized as a shift from some variant of formal rationality to some mode of

45. This has been a common argument in movements to reform divorce law. *See, e.g.*, N. BLAKE, THE ROAD TO RENO 212 (1962); *cf.* J. KAPLAN, MARIJUANA: THE NEW PROHIBITION (1970).

46. *See, e.g.*, Llewellyn, *supra* note 1.

47. *See* notes 2–4 *supra* and accompanying text.

48. *See* H.S. MAINE, ANCIENT LAW 1–20 (1861); M. Rheinstein ed., *supra* note 2, at 61–64.

49. *See* M. Rheinstein ed., *supra* note 2, at 61–64.

purposive rationality.[50] The earlier rationalization held a set of values to be objectively true. Society was seen as essentially static. The task of guiding society, in which law played a part, was directed toward realizing and preserving traditional values. This was assured by selecting state officials from an elite imbued with those values. Legislation expressed and clarified values already immanent in the society; adjudication merely reasserted the values enunciated by previous judges.

The contemporary rationalization, by contrast, is less concerned with the expression of values than with the realization of practical goals conceived in utilitarian terms and pursued according to canons of scientific reasoning.[51] Because it sees these goals, and also the underlying values, as idiosyncratic and subjective,[52] it is forced to develop some method of choosing among them.[53] Because the size of the social unit within which choices are made and pursued has grown enormously, its members can no longer participate directly in their own governance. This has the important consequence that the actions of those who do govern must be seen as making a difference, a difference phrased in terms of the realization of goals, not just the expression of values. Hence those officials who act by formulating and applying behavioral standards—legislators, judges, and executives—must show that their actions are rationally related to some goal. The pressures for such explicit justification are intensified by the tension between the prevailing ideology of democracy, and popular mistrust of historical or potential elites coupled with the increasing differentiation of the official class.

We can see examples of the predominance of this mode of rationalization throughout our legal system. Constitutions are traditionally repositories for expressions of timeless value, but ours is reinterpreted as a document within which numerous interest groups can locate the partisan goals they strive to attain. Legislation is preceded by extensive research intended to elicit opinion about goals as well as information concerning the way in which behavior deviates from those goals. The reasoning which a judge offers to justify his decision increasingly relates that decision to the achievement of some goal. When he construes legislation he does so in terms of legislative intent, furthering goals chosen by the legislature. Legal scholarship seeks to organize and, if necessary, reform legal rules in order to

50. The types developed *infra* do not pretend to be a faithful reproduction of Weber's ideas.

51. I wish to reemphasize that I am writing of the way in which legal professionals describe the legal system. Others have looked behind the rationalization to portray the legal system differently. *See, e.g.*, J. GUSFIELD, *supra* note 37.

52. The subjectivity of values cannot be complete, however. In order to gain acceptance, even this mode of rationalization demands minimal agreement upon the method of choosing among goals. This explains why democracy and the rule of law are unquestioned in the West, as are the rule of the proletariat and people's justice in communist societies.

53. This necessity for choice, and the impermanence of any actual compromise, throws society into constant change in an effort to achieve the always elusive goal; change itself comes to be valued in the name of progress.

further substantive goals; indeed, a subdiscipline devoted to this has developed—the policy sciences. Legal education at the elite law schools claims to train students in this form of policy analysis. The identification of social problems invariably produces an outcry from the most diverse sources for legislative or judicial action to solve them.[54] And American lawyers committed to social change in other nations urge the exportation of our legal system because of its capacity to further substantive goals.

C. *Sociology and the Gap Problem*

The gap problem, however, is not just the preoccupation of legal professionals; it has also been the primary focus for books about law written by social scientists. Its attraction for the latter has a different origin. Sociologists do not ordinarily begin with the expectation that law can mold behavior; this assumption inheres in the rationalization peculiar to legal thought and practice, and is therefore alien to nonprofessionals. Rheinstein clearly recognizes this:

> While lawyers and lawmakers have concentrated their attention upon divorce and neglected factual marriage breakdown, behavioral scientists have looked upon family disintegration as a unitary phenomenon paying scant attention or no attention at all to the law in general and the law of divorce in particular.[55]

I think his observation can be generalized beyond the area of divorce: social scientists in the first half of this century consistently ignored law, whether as a social phenomenon worthy of study in its own right, or as a significant variable for the explanation of other realms of behavior. The reasons for this again are very complex. Law, with its technical vocabulary and professional carapace, has long seemed impenetrable to other disciplines. More important, the prevailing legal rationalization has claimed to be a sufficient explanation for the legal system, thus rendering superfluous other efforts at understanding.

Sociology, in its infancy, was unprepared to challenge this boast. As it gained in stature, however, some reply became vitally important: acceptance of the rationalization would not only make a sociology of law impossible, it would also jeopardize the pretensions of sociology to offer an independent explanation for social action. Hence the early efforts of the sociology of law were devoted to establishing the existence of a gap between legal rules and the behavior to which those rules spoke.[56] These efforts demonstrated

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54. As Rheinstein has observed of the rising divorce rate: "Every year usually produces legislation in quite a number of American states and foreign countries." P. 5.

55. P. 265. *See also* p. 292. This observation is confirmed by William Goode's inclusion of only a couple of propositions about law in his inventory of some 3,000 propositions concerning the family. *See* W. Goode, E. Hopkins & H. McClure, Social Systems and Family Patterns: A Propositional Inventory (1971).

56. *See, e.g.*, the extensive literature reproduced or cited in L. Friedman & S. Macaulay, Law and the Behavioral Sciences 197–505 (1969).

that legal rules could not explain behavior within legal institutions and, a fortiori, could not explain the behavior those institutions sought to control. Once this was demonstrated, sociology could, and did, offer alternative, more adequate explanations. However, because social scientists shared the dominant political ideology, and because many, through long collaboration with legal professionals, came to accept their rationalizations, these studies were frequently directed by the belief that the gap, once revealed, could and should be eliminated.[57]

If sociologists were drawn to the gap problem when they studied law as control, they also arrived at that formulation when they viewed law as norm. This latter approach was slow in developing; Sumner's dismissal of law-ways long dominated the ideology of social scientists.[58] But the conspicuous activities of legislators, judges, and administrators declaring norms in the form of statutes, judgments, and regulations could not be overlooked forever by a serious sociology. In explaining such behavior, sociologists made use of the concept of norm constructed by the prevailing social theory, which saw society as the individual writ large—the "organic fallacy" which has so strongly influenced all social thought.[59] That theory extrapolated from an oversimplified psychology which expected the normal person to exhibit a harmony between thought and action. Any departure from this pattern would be aberrant: if unintentional, it would suggest mental disease or arrested development; if deliberate, it would be innocent joking or, worse, deceit, hypocrisy, or make-believe. If social action is viewed as individual behavior, and social norms as personal norms, these expectations can be extended by analogy. The expectations appeared to be confirmed by early studies of social norms—expressed in literature or the mass media, in conversation or in response to interviews and questionnaires. Norms were generally in harmony with conduct and any departure could be explained as merely temporary. With the model thus reinforced by selected data, law which diverged from behavior could only be seen as either an irrelevant excrescence upon the social organism—the older view which was no longer maintained—or a pathological instance of social norms.[60] This latter attitude can be seen most clearly in sociological studies of the criminal law, the

57. *See, e.g.*, E. SCHUR, CRIMES WITHOUT VICTIMS (1965). I offer, with some hesitation, the suggestion that the desire to eliminate the gap is one of the underpinnings of the natural-law school of legal sociology that has come to be associated with Philip Selznick and the Center for the Study of Law and Society at Berkeley. *See, e.g.*, P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (P. Nonet & H. Vollmer collabs. 1969); Selznick, *The Sociology of Law*, in SOCIOLOGY TODAY: PROBLEMS AND PROSPECTS 115 (R. Merton, L. Broom & L. Cottrell eds. 1959).

58. *See* W.G. SUMNER, FOLKWAYS (1906).

59. *See generally* R. NISBET, SOCIAL CHANGE AND HISTORY (1969).

60. There are, however, very few empirical studies of the divergence between positive law and normative attitudes. The only two of which I know are KNOWLEDGE AND OPINION ABOUT LAW (C. Campbell, W. Carson & P. Wiles eds. 1973) and J. COHEN, R. ROBSON & A. BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW (1958).

substantive area in which law most closely resembles social norm in form and subject matter.[61] Such studies were commonly preoccupied with the gap problem, selecting for examination precisely those laws which deviate most markedly from behavior: statutes proscribing prostitution, homosexuality, and other sexual activities; prohibition and drug laws; white-collar criminal laws. The deviance found was viewed, at best, as a misunderstanding, or, at worst, as hypocrisy; in either case it could be solved, generally by conforming law to behavior. Thus, social scientists have ended up where lawyers began, perceiving the gap as the central issue for studies about law.

This continuing preoccupation with the gap problem has had unfortunate consequences for the development of a social theory of law. Scholarship is confined to a single question, seen from two perspectives: why does behavior deviate from law; why does law mandate a conformity which is not forthcoming? We are thus directed to particular gaps between law and behavior, and how we may close them. But we cannot question the expectation of harmony itself; we cannot entertain the possibility of another relationship between law and behavior, or begin the construction of a more complex model in which law and behavior interact without a one-to-one correspondence.[62] As long as we continue to define the gap as our problem, books about law, whatever their claims, will be little more than law books.[63]

III. Method: The Nature of the Explanation

How does Rheinstein seek to understand the problem of marriage instability and the gap between such behavior and the law? Although he offers no explicit statement,[64] some view of what constitutes a satisfactory explanation must underlie any relational statement. It is important to be

61. *See, e.g.*, E. Schur, *supra* note 57.

62. This is intended as a criticism of an approach to books about law. Although Rheinstein is strongly influenced by this approach, he does go beyond it. In Part IV of this essay I extrapolate from his discussion of other issues and seek to develop a more complex model.

63. Single-minded concentration on the gap is similar to sociological inquiry devoted solely to manifest functions. Merton wrote many years ago: "The distinction between manifest and latent functions serves further to direct the attention of the sociologist to precisely those realms of behavior, attitude and belief where he can most fruitfully apply his special skills. For what is his task if he confines himself to the study of manifest functions? He is then concerned very largely with determining whether a practice instituted for a particular purpose does, in fact, achieve this purpose. . . . [S]o long as sociologists *confine* themselves to the study of manifest functions, their inquiry is set for them by practical men of affairs (whether a captain of industry, a trade union leader, or, conceivably, a Navaho chieftain, is for the moment immaterial), rather than by the theoretic problems which are at the core of the discipline. By dealing primarily with the realm of manifest functions, with the key problem of whether deliberately instituted practices or organizations succeed in achieving their objectives, the sociologist becomes converted into an industrious and skilled recorder of the altogether familiar pattern of behavior. *The terms of appraisal are fixed and limited by the question put to him by the non-theoretic men of affairs . . . .*" R. Merton, *Manifest and Latent Functions*, in On Theoretical Sociology 73, 119 (1967).

64. He does begin to do so in the opening paragraphs of chapter 12: "[H]ow can one inquire whether there exists a cause and effect relationship between a society's law of divorce and its state of marriage stability? Before presenting the fragmentary empirical data we shall try theoretically to determine what kinds of relationship may conceivably exist." P. 277.

aware of the kind of explanation sought: even if the choice is simply a reflection of individual values and thus is not open to criticism by others, it still constitutes the source of criteria by which to assess the success of the explanation offered. One of my difficulties with Rheinstein's book is the number of radically different modes of explanation found in close juxtaposition. A good example is his explanation for the fact that several countries do not grant alimony following divorce. "The Japanese system is a relic from the time of complete male domination. The socialist scheme is a technique to push women into the labor force. In the nonsocialist countries the same process is going on simply as an incident of industrialization."[65] Here, in three consecutive sentences, a legal institution is explained as (1) a historical relic; (2) an instrument of conscious social planning; (3) a product of other social and economic changes. My objection is not that different explanations are offered, for the reasons may differ empirically in different societies, nor is it doctrinaire opposition to eclecticism; it is a fear that lack of clarity about the goal defeats any attempt to achieve rigor in pursuing it. This Part, therefore, tries to unravel the kinds of explanation advanced in order to lay a basis for evaluating Rheinstein's empirical theories and propositions.

A. *"The Comparative Method of Legal Research"*

Rheinstein invokes this phrase to describe what he is doing.[66] And though he offers no further elaboration, nor any reference to other discussions of the comparative method, it is possible to extract his notion of that approach from his practice of it. The materials that he uses are of two kinds, historical and contextual.

"History holds the explanation," he asserts dramatically at the beginning of the book.[67] By this he appears to mean that every social phenomenon is best understood as the end product of a unique sequence of many, perhaps all, of the events which preceded it. Explanation is the narration of those prior events. Everything cannot be included, but Rheinstein presents no clear criteria for his choices. Frequently, the factors he selects do help me to understand the phenomenon in question. Thus I am persuaded that the explanation for the particular form of the divorce law implanted in the French Civil Code of 1804 is the conservative reaction to the excesses of the French Revolution, a reaction which succeeded in confining divorce within the narrow forms of the "ancient ecclesiastical institution of judicial separation."[68] Indeed, I would follow Rheinstein further and agree that

65. P. 405.
66. P. xi.
67. P. 6.
68. P. 210.

history offers the only explanation for the precise wording of the statute. At other times, however, his choice seems arbitrary and unsatisfactory. Rheinstein writes:

> Both of the Japanese institutions, divorce by agreement and the Family Court, are adaptations of ancient Japanese traditions to modern conditions. Divorce by private act and without intervention of public authority historically constituted an integral part of that type of social organization which has been called the "family system" and which continued substantially the same until the end of World War II.[69]

But his own data contradict this relationship. Divorce by private act was historically available only to men; divorce was not available to women at all.[70] The family law reform of 1947 which granted the right of divorce to men and women equally is thus not explained by the factors which Rheinstein has adduced. Although this particular failing might be cured by locating additional data to account for changes in the role of women, I think it still reveals the drawbacks of the method: its limitation to the unique phenomenon being explained, and its lack of clear standards for deciding what should go into that explanation.

Another mode of explanation is conveyed by the title Rheinstein gives to the central portion of his book: "Divorce in the Cultural Context."[71] This approach, which explains law by the enumeration of elements in its contemporary milieu, is closely analogous to history, which explains by the narration of antecedent facts. Here, again, everything cannot be included, and again there are no clear criteria for selection.

This sort of explanation is strikingly reminiscent of the early manifestoes of functionalism. Malinowski, its most vehement exponent, wrote:

> [W]e are demanding a new line of anthropological field-work: the study by direct observation of the rules of custom as they function in actual life. Such study reveals that the commandments of law and custom are always organically connected and not isolated; that their very nature consists in the many tentacles which they throw out into the context of social life; that they only exist in the chain of social transactions in which they are but a link.[72]

This insistence upon viewing any phenomenon in its social and cultural context is doubtless a necessary corrective to the misleading practice of analyzing or comparing isolated artifacts ripped from their environment; and indeed legal scholars, with their tradition of parochial self-absorption, are probably more in need of the warning than anthropologists, whose interests have always been catholic. Rheinstein's erudition and breadth of learning

69. P. 115.

70. *See* p. 116. Women could obtain a divorce by taking refuge in one of two divorce temples, but the number who could, and did, choose this remedy was insignificant.

71. Pp. 107–243 (pt. II).

72. B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 125 (1926).

equip him superbly for this task. Consider the following exposition of the absolute prohibition against divorce which prevailed in Italy at the time of its unification:

> Divorce was no acute problem even for the liberal intellectuals who constituted the *valentior pars* of Italy, and still less to the masses, irrespective of whether they were good Catholics or anticlerical socialists. Italian men did not need legalized remarriage if their marriages turned out to be unsatisfactory. Besides, the great majority of marriage expectations were likely to be modest and disappointment consequently rare. The age at marriage was high, especially for men. One ought to be able to support a family. Mate selection was a family affair rather than the outcome of falling in love. The latter was the privilege of the heroes of opera, who would dramatically illustrate the evil consequences of such folly. Marriage was one thing and love another, and nothing but mischief would result if the two happened to be mixed. But there were the substitutes, at least for the men: houses of prostitution and the mistress system. The wives were expected to be virtuous and to find satisfaction in the children and in the constant contacts with cousins, aunts, grandparents, etc. If consolation was necessary, it could be found through the church.[73]

The number and diversity of factors which are assembled to explain the conjunction of rule and behavior is impressive: the availability of sexual outlets outside of marriage, and of channels for the sublimation of sexual drives; the age at marriage; the economic structure of the family; popular expectations concerning marriage; the cultural image of love; the influence of religion; sexual role differentiation; and the class structure. But does not this approach lead to an *embarras de richesse*? Everything cannot be, and of course is not, invoked in the explanation; yet no principle of selection is stated, or justified. A catholic sensitivity to context may be a necessary prerequisite to understanding any social fact, but it is not yet that understanding itself.

Both narrative history and functional contextualism aim at description, not explanation. They depict the unique event or phenomenon; they do not seek to subsume it as an instance of a more general law. There are accepted artistic notions of what should or should not be included in the description, but there is no test for the appropriateness of a particular scholar's choice. These characteristics restrict the kind of comparison that is possible. Because the descriptive data are extensive and appear to be rather miscellaneous, comparison is intuitive and the results suggestive at best—often no more than a rediscovery of *autre temps, autre moeurs*. Perceived differences cannot be attributed with any certainty to one factor or set of factors rather than another. Little attempt is made to control the comparison, as required in the physical and social sciences. Perhaps because the results are so difficult to achieve and seem so unimpressive, little comparison has in fact been attempted in history or in anthropology; the monograph,

73. P. 187.

bounded in time, society, or culture, remains the scholarly paradigm. Despite Rheinstein's claim to use the "comparative method of legal research," his book, too, consists largely of descriptions of discrete national legal systems, albeit in historical and cultural context, with little comparison among them.[74]

B. *Scientific Explanation*

Yet Rheinstein's own analysis of legal phenomena frequently exceeds the limited goals he sets himself. Notwithstanding the disclaimer that he is neither statistician nor sociologist,[75] he seeks to explain, to subsume the particular fact under a more general law, not just to describe it in its uniqueness. Although these generalizations are frequently implied, sometimes they are stated quite clearly:[76]

> *Universally*, it can be said, statutory schemes of *divorce sanction* have been transformed into schemes, in actual practice, of *divorce faillite*, in England, in the United States, in Germany and elsewhere.[77]

> As seems *inevitable* in any system of divorce based on the principle of breakdown, the tendency to consider one party guilty also appeared in the USSR.[78]

> [A] strict statute law of divorce is not an effective means to prevent or even to reduce the incidence of marriage breakdown.[79]

It should be clear where my sympathies lie among these methodological alternatives. I believe that description, though a necessary prerequisite to understanding, is a dead end unless it leads toward scientific explanation.[80]

My belief does not appear to be shared by the majority of legal scholars, even those caught up in the contemporary enthusiasm for social science. The few who try to incorporate a social scientific approach in their own writings commonly select the methods of narrative history and functional contextualism, which readily lend themselves to such incorporation without making significant new demands upon the scholar. Legal rationalization, the ordering of legal rules, remains the central enterprise; the description of other social facts, whether historical or contemporaneous, is subordinated to it. Facts are selected in order to illustrate the rationalization;

74. This is not so much a criticism of Rheinstein as of a whole school. Comparative law is rarely comparative; instead, the term tends to signify that the law is foreign to the scholar studying it, or to the audience for whom the study is intended.

75. P. xi.

76. I am concerned with the form of these propositions, not with their truth. Scattered, as they are, throughout the book, they may escape the reader's notice; once assembled, however, they seem to offer a beginning for more general theories about law and social action.

77. P. 210 (emphasis added in part). Rheinstein uses the French phrases in much the same way as American lawyers use the terms "fault" and "no-fault" divorce.

78. P. 235 (emphasis added).

79. P. 406.

80. In stating this preference, I am going well beyond my original definition of books about law, which I described as works borrowing the perspective of another discipline, whether humanistic or social scientific. I do not mean to denigrate the value of humanistic studies—of which narrative history and functional contextualism are examples; I simply choose to follow another approach.

indeed, where the rationalizing principle is a substantive purpose, such facts are essential to the task. Narrative history and contextual functionalism are ideally suited to this role since they offer the scholar an unlimited source of data without straitjacketing him within rules which dictate the selection and use of his data. This illustrative use of social facts can be found everywhere: in the "cases *and materials*" approach to legal education, in judicial opinionwriting and legislative reform, and in law books.

Nevertheless, many of these scholars, like Rheinstein, drift imperceptibly from description into explanation. There may be many reasons for this: commonsense notions of explanation pervade our everyday speech and thought; explanation seems to offer greater comprehension; the intellectual status of physical science lends an aura of superiority to all imitations. But the difference between the two intellectual orientations is more radical than such studies generally acknowledge. Scientific explanation cannot be subordinated to the task of legal rationalization: it offers its own mode of understanding which, when confirmed by the necessary evidence, may demonstrate that the legal system is not functioning in conformance with the precepts of the rationalization. In order to justify this claim to superior explanatory power, it has developed its own autonomous, rigorous criteria for knowledge, both theoretical and methodological. In what follows, therefore, I shall set out and employ those criteria in evaluating Rheinstein's explanations of legal and other social phenomena.

IV. Propositions

A. *Law as an Explanation of Behavior*

I think that Rheinstein's initial explanatory scheme can fairly, if simply, be described by the model:[81]

law ⟶ behavior

I argued earlier that his values led him to begin by investigating substantive legal standards as the explanatory factor; they also pointed to the behavior to be explained: the threat to his ideal of the family was originally conceived as located in divorce itself.

> The high divorce rate and its seemingly continuous growth had created the impression that something was wrong in society, that there was some evil that was to be fought. Naïvely we took it for granted that the evil was divorce. In that we shared the belief of almost everyone who had ever thought about divorce legislation in the United States and elsewhere.[82]

81. By a model, I mean nothing more pretentious than a schematic representation of several social scientific concepts and their connections. A model is not a theory, but it may aid the development of theory by increasing the clarity and explicitness with which we see those connections. Models necessarily simplify, but they also reveal gross oversimplification and thereby help us to correct it.

82. P. 262. This apologia claims a uniformity of thought greater than that which actually existed.

The elements which contributed to this choice are of interest because they influence the development of his model: divorce is behavior within the legal system; it therefore has immediate legal significance and would appear to be relatively accessible to legal control; for similar reasons, the divorce rate is an official statistic, which brings it to public attention and facilitates its use as a variable for analysis.[83]

One might expect this choice of variables to lead naturally to a narrow concern with drafting statutory language which would produce the desired divorce rate. It is greatly to Rheinstein's credit, therefore, that he dethroned the relationship between law and behavior from the level of a pervasive, strongly held ideology,[84] and made it an empirical proposition:

> 1. The more stringent the requirements of the substantive law of divorce, the lower will be the divorce rate of the society; the less stringent, the higher that rate.

He tested this proposition in two ways. First, in order to falsify it, he offered what must be considered little more than anecdotes about different societies:

> In spite of the ease with which a marriage can be terminated under Japanese law, the divorce rate is by no means high . . . . Since 1938, the rate per 1,000 population has consistently been about one-third of that of the United States, slightly lower than that of the German Reich.[85]

> The Scandinavian situation indicates that a divorce law clearly based upon the individual view of live and let live has, at least so far, been compatible with the maintenance of the institution of marriage, even if it is accompanied by a far-reaching alleviation of traditional sex taboos.[86]

Here is the use of social science data in a thoroughly unscientific manner—what Max Gluckman, in another context, derogates as apt illustration.[87] The influence of the substantive law upon the divorce rate can only be discovered if the variation in other relevant factors is held constant, or at least ascer-

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But I think Rheinstein is basically correct about the prevailing assumptions. His assertion is thus consistent with my argument in the preceding Part that legal and social scientific thought have tended to direct research about law at a single, narrow problem.

83. There is a close parallel between studies of divorce and studies of crime; both refer to legal acts which are tabulated in official statistics. The consequences of allowing such factors to determine our choice of variables, and thus the direction of our research, have been equally unfortunate in both instances. On the unfortunate consequences of using crime rates, *see, e.g.*, J. SKOLNICK, JUSTICE WITHOUT TRIAL 164–81 (1966); Black, *Production of Crime Rates*, 35 AM. SOCIOLOGICAL REV. 733 (1970). On the unfortunate consequences of continuing to use variables defined by commonsense, what Stinchcombe calls "natural variables," *see* A. STINCHCOMBE, CONSTRUCTING SOCIAL THEORIES 41 (1968): "natural variables *that create administrative problems* generally are not the same variables *that have a unique set of causes.* Sometimes applied researchers formulate this by saying that a natural variable 'has multiple causes.' From a scientific point of view, this means that the applied researcher is trying to explain the wrong thing."

84. P. 406.

85. Pp. 119–20.

86. Pp. 127–29.

87. Gluckman, *Introduction*, in THE CRAFT OF SOCIAL ANTHROPOLOGY at xi, xiii (A. Epstein ed. 1967). Elsewhere, Rheinstein himself criticizes this error. *See, e.g.*, p. 217.

tained. The failure to do either vitiates much of the evidence Rheinstein extracts from the available social science literature.[88]

He sought to meet such criticism by conducting his own empirical research into changes in the divorce rate which accompanied the enactment of the German Civil Code of 1900. Prior to that date, the several German states had each had different laws for divorce, some more stringent, some more liberal than the Code. Nevertheless, the number of petitions for divorce filed per unit population, and the proportion of those petitions granted, did not change significantly with the imposition of the new law; and the limited changes that did occur could not be explained by increases or decreases in the severity of the law. He interpreted these results as follows:

> The shape of the law of divorce was neither the cause of the divorce wave nor even one of its essential conditions. In the main, the influence of the law did not make itself felt as against that of other circumstances. . . . Neither was it possible upon a broad scope to prevent spouses who were ready to resort to divorce from doing it . . . .[89]

Having reached this conclusion, Rheinstein forthrightly reconsidered the choice of variables that had led him to it. Still unwilling to dislodge substantive legal standards as the explanatory factor, he altered his behavioral focus: divorce was seen as the terminus of a behavioral sequence that had its roots at an earlier stage.[90] With the vehemence of a late convert to the cause, he castigates Edmund G. Brown, former Governor of California, for perpetuating the fallacy that "divorce produces not only broken homes but broken lives":

> Even endless repetition cannot make true the proposition that lives or homes are destroyed by divorce. What may destroy homes or lives is something quite different: the breakdown of a marriage, an event in the realm of fact which is different from and regularly precedes that event in the realm of law which is called divorce . . . .[91]

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88. *See* the discussion of some of the available evidence at pp. 288–307.

89. Pp. 299–300. In making this assertion, Rheinstein was certainly not unaware of the limiting case in which the law can affect the rate of divorce by prohibiting divorces absolutely. Indeed, a chapter of the book is devoted to Italy, which he characterizes as a *Divorceless Country*. *See* pp. 158–93.

90. Criminological studies have developed along similar lines, arguing for a shift of attention from criminal behavior to the sources of crime.

91. Rheinstein is a late convert indeed. Forty years ago, Karl Llewellyn wrote: "[D]iscussion of divorce has too often started from the premise that divorce was an evil in itself, as if it was *divorce* that mattered. Whereas what matters is wedlock. The clearer-sighted have indeed insisted either that divorce was in essence a symptom rather than an ill, or that it was in the nature of official recognition of marriages broken in fact before officials came to act." Llewellyn, *Behind the Law of Divorce*, 33 COLUM. L. REV. 249, 262 (1933). He cited, in support of this claim, books written as many as 80 years before Rheinstein's volume. *Id.* at 262 n.30, *citing* G. HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS (1904); J. LICHTENBERGER, DIVORCE: A SOCIAL INTERPRETATION (1931); Willcox, *The Divorce Problem*, in 1 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 9 (Columbia Coll. Study No. 1, 1891). And similar views were expressed by moderates at the National Congress on Divorce Laws, held in Washington in February 1906. *See* N. BLAKE, *supra* note 45, at 141–44.

Hence marriage breakdown becomes the behavior to be explained. However, Rheinstein's definition of that concept reveals that his break with the past was not as thorough as the change in terminology might suggest:

> Factual marriage breakdown is not easy to define. In one sense we may regard every marriage as having broken down that has failed to give the spouses the degree of happiness or satisfaction they hoped for when they took the fateful step of matrimony. Frequent quarrels or mere disharmony may sap the energies of spouses and adversely affect their happiness and their effectiveness as citizens. If there are children, their mental and physical well-being is likely to be impaired. . . . From society's point of view such situations are evil; they have attracted the attention of moralists, psychiatrists, and reformers bent upon the improvement of the human lot. But they concern us here only when they result in abandonment or separation. It is in this sense that marriage breakdown is linked to divorce. Besides, situations of internal dissension are not susceptible to exact observation and statistical comprehension. We are concerned with marriage breakdown as a mass phenomenon and the problem of how, if at all, its incidence might be reduced. It is for this compelling reason of statistical observability that we shall limit ourselves to inquiry concerning marriage breakdown in the sense of physical cessation of the spouses' life in common, i.e., of abandonment and separation.[92]

Rheinstein's values influence this conceptual reformulation, just as they did his original choice. Marriage breakdown is not identical with divorce; if it were, there would be no reason to substitute the former for the latter, especially since it is more difficult to measure. The linkage between them is also not as simple as Rheinstein appears to suggest: geographic separation is not a necessary condition for divorce—many disaffected couples live together until they are divorced, and even after, for economic or other reasons[93]—nor is it a sufficient condition—many separated couples never divorce. Neither is the change justified by Rheinstein's makeweight methodological argument: scientific concepts are not limited to those statistics already compiled by the Bureau of the Census, and exact observations can certainly be made about the behavior of couples still living together. The definition, instead, appears deliberately designed to avoid any inquiry into the content of human relationships either before or after the separation.[94] It also carries the implicit suggestion that factual separation somehow di-

92. Pp. 262–63.

93. Because of the housing shortage in Russia, divorced couples are often unable to find alternative accommodation, and must continue to live together, sometimes for several years. *See, e.g.*, G. FEIFER, JUSTICE IN MOSCOW 154 (1964) On the other hand, a New York court has adopted Rheinstein's reasoning and has refused to grant a legal separation on the grounds of intolerable cruelty where the couple was still living together because unable to find a second apartment. *See* Berman v. Berman, 277 App. Div. 560, 101 N.Y.S.2d 206 (1st Dep't 1950), *reprinted in* J. GOLDSTEIN & J. KATZ, *supra* note 3, at 412.

94. William Goode also chooses not to study the happiness or unhappiness of the marital relationship, but for very different reasons. *See* W. GOODE, *supra* note 9, at 5–7.

vides those marriages which should be terminated from those which should not.

However, if the particular definition is open to criticism, the new concept did help Rheinstein to see the improbability of the relationship between legal standards and behavior that he had previously hypothesized.[95]

> If a married couple does not wish to live together, they cannot be compelled to do so. The law can preclude divorce, but it cannot prevent factual marriage breakdown. The law can deny freedom of remarriage, but it cannot thereby prevent a man and a woman from living together in a union which may be called irregular but which may resemble matrimony in every respect except the absence of the legal bond.[96]

Although Rheinstein felt certain of this relationship, he adhered to proper scientific procedures and proceeded to test the implicit proposition:

> 2. The more stringent the requirements of the substantive law of divorce, the lower will be the rate of factual separation; the less stringent, the higher the rate.

He tested this by means of a careful cross-cultural study:

> The plan was to compare for the decade of 1947 to 1956 the cases of marriage breakdown that had occurred in the easy-divorce Swiss canton of Ticino and the divorceless Italian provinces of Como and Varese (Comasco), i.e., a region of comparatively homogenous [*sic*] ethnicity, religion, and socioeconomic structure.[97]

Unfortunately, errors in data collection rendered the results inconclusive. Even without that obstacle, however, the study indicated the enormous difficulties of controlled comparison. Despite Rheinstein's assertion that the two regions were sufficiently similar with regard to other significant factors, he writes only sentences later:

> [Comasco] is a region of considerable male migration. Traditionally a sizable number of Comaschi have been engaged in the building trades, as simple masons or as highly skilled decorators or sculptors. They exercise their trade all over Italy and many migrate to other countries. The women stay at home and wait for their husbands' return, which may never occur.[98]

Rheinstein refers to this only as an ambiguity which complicated the identification of instances of factual separation; to me it reveals a structural

95. Here, again, there are close parallels with the development of criminology. Initially, both employed analytic categories derived from law: the granting of a divorce; the arrest or conviction for violation of a criminal law. Eventually it was realized that the significant actors—the married couple, the offender—do not structure their behavior in terms of the law. For the married couple, the behavior of each is oriented toward the other, and toward relatives and friends; for the offender, behavior is oriented toward peers, significant authority, etc. Only by studying the origin of such behavior can we hope to understand divorce, or crime, either of which may be little more than an incidental result.

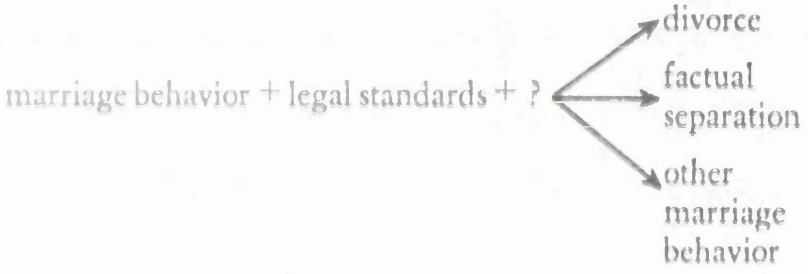
96. P. 277.

97. P. 305.

98. P. 306.

difference between the two regions which makes meaningful comparison impossible.

Yet if Rheinstein has not falsified either proposition conclusively, he has advanced knowledge in a different way. He has pointed to the distinction between what he calls events "in the realm of fact," such as separation or some other form of disagreement, and events "in the realm of law," such as divorce.[99] He has also shown that the relationship between substantive law and either of these behaviors is not likely to be a simple causal one. Nevertheless, substantive law remains significant because it helps to apportion marriage breakdown between factual separation and legal divorce. Thus Rheinstein's efforts to test the proposition with which he began, and to refine the concepts it employs, lead to a new model of divorce law in society which can be formulated roughly as follows:



B. *The Legal System as an Intervening Variable*

This revised model appears to omit some crucial elements; although Rheinstein's empirical investigations are not conclusive, they certainly suggest that legal standards, by themselves, are not a sufficient explanation for the way in which marriage behavior is distributed among the possible outcomes.[100] One source for the missing variables is the structure of the legal institutions which administer those standards. Such structural factors have generally been overlooked, perhaps as a consequence of the prevailing legal rationalizations. The mechanical jurisprudence of 19th-century formalism saw the judge as a cipher between the legal standard and the decision; his behavior, and that of other legal professionals, would perfectly mirror the law.[101] Contemporary jurisprudence has abandoned that conception, and acknowledges that judges retain some leeway for action within the confines of statute and precedent. But while granting fuller recognition to the significance of institutional framework for professional action, this view also demands a new rationalization which will show that the freedom now accorded legal professionals is not exercised in a random or arbitrary

99. P. 5.

100. The exception is the limiting case discussed in note 89 *supra*.

101. Just as Rheinstein began by assuming that law could regulate behavior outside the legal arena, so this rationalization assumed that law could regulate the behavior of legal professionals.

fashion. As I indicated above,[102] this rationalization is articulated in terms of principles and policies subserving social purposes: judges advance legislative purpose; when the legislature has not spoken they follow public policy; and, according to Rheinstein, even when the legislature has acted judges can ignore the law and articulate unspoken values.[103] Unfortunately, although this new rationalization no longer denies the significance of institutional factors, it still distorts analysis. The courtroom is seen as a forum for covert political compromise; only a blind ideological commitment to democracy can explain such a view.

But when Rheinstein sets aside his a priori image and instead reports the way courts hear "the monotonous mass of uncontested divorces," we get a very different picture of the institution:

> [T]hey are handled on the assembly line. Nobody knows of the tragedies and the misery except the parties and the judge. He cannot avoid being aware of all the sadness, the disappointed hopes and expectations, the yearning for freedom. He hears the testimony. He knows that it may be false. But it may be true. It often is. Why should he go behind it? Even if he wanted to, he has neither the tools nor the time. The devices which statutes and procedural history have given him, have been whittled away by nonuse. Here is the plaintiff, mostly the woman, from the working class in the majority of cases, visibly miserable and unhappy. She has told her story, corroborated by the necessary number of witnesses. The husband has been properly served with process, but he has not come to court. So why not grant the divorce? A judge new in the divorce court may care, may order the husband to appear, may ask questions and attempt conciliation. Once divorcing has become routine, the judge is not likely to continue wasting such time and effort. So the divorce court becomes Siberia. The judge is anxious to escape into less distasteful divisions of the court, and the mill grinds on.[104]

This brief description of a functioning court may help to elaborate Rheinstein's proposition that:

> 3. "Universally, it can be said, statutory schemes of *divorce sanction* have been transformed into schemes, in actual practice, of *divorce faillite* . . . ."[105]

Among the institutional variables which may be implicit in that proposition, Rheinstein's description suggests the following:[106]

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102. *See* text accompanying notes 41–54 *supra*.

103. Pp. 252–55.

104. Pp. 255–56 (footnote omitted).

105. P. 210.

106. Rheinstein's observations are hardly original. For reasons that are not entirely clear to me, the initial burst of enthusiasm for legal realism was directed in large part at those institutions which administer family law. For good empirical studies of working courts which resulted, see, *e.g.*, W. GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY (1954); O. MCGREGOR, L. BLOM-COOPER & C. GIBSON, SEPARATED SPOUSES: A STUDY OF THE MATRIMONIAL JURISDICTION OF MAGISTRATES' COURTS (1970); L. MARSHALL & G. MAY, THE DIVORCE COURT (vol. I: Maryland, 1932; vol. II: Ohio, 1933); M. VIRTUE, FAMILY CASES IN COURT (1956); Feinsinger, *Observations on Judicial Administration of Divorce Laws in Wisconsin*, 8 WIS. L. REV. 27 (1932); Feinsinger & Young, *Recrimination and Related Doctrines in the Wisconsin Law of Divorce as Administered in Dane*

(a.) The availability of evidence about past conduct. This is a characteristic of legal institutions, but it reflects such social structural variables as the physical privacy of the home, the intimacy of the marital relationship, the decreasing importance of the extended family, etc.

(b.) The reliability of such evidence. This is limited by the absence of the opposing party, who alone could rebut, and the failure to use available procedures to test the evidence.

(c.) The degree of interest in asserting legal standards. Low interest is a consequence of the fact that the proceeding is rarely adversarial, since one spouse usually defaults or fails to contest, and those officers of the court assigned to assist in this role fail to perform it.

(d.) The caseload, *i.e.*, the number of cases a judge is expected to process per unit time. This depends on the personnel and money which the government allocates to the task, as well as the number of cases which plaintiffs file.

(e.) The routinization of cases. This is a function of the repetitiveness of the evidence (because of its inevitable superficiality) and caseload pressures. Routine reinforces itself; it strengthens the expectation of each legal professional that the others will adhere to customary patterns; anyone who deviates from these patterns will be sanctioned, including the judge.

(f.) The low status of the domestic relations bench and bar[107] within the professional hierarchy. This is a function of the preceding variable. Because of this status, the more competent judge is elevated above that bench, and the ambitious lawyer seeks a more prestigious practice. Those who remain have no hope of advancement, and no reason to display excessive zeal.

(g.) The social distance between judge and plaintiff. This includes, among other factors, differences in sex, socioeconomic status, and education. The greater the distance, the more difficult it is for the judge to treat the party as an individual; the results are stereotyping and a mechanical processing of the case.[108]

As we have already seen, Rheinstein offers the obverse proposition as well:

> 4. "As seems inevitable in any system of divorce based on the principle of breakdown, the tendency to consider one party guilty also appeared . . . ."[109]

County, 6 WIS. L. REV. 195 (1931); Parnas, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 585 (1970); Note, *The Administration of Divorce: A Philadelphia Study*, 101 U. PA. L. REV. 1204 (1953).

107. The domestic relations bar has been studied in an excellent monograph, H. O'GORMAN, LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE (1963).

108. I have developed this notion at greater length in *A Comparative Social Theory of the Dispute Process*, 8 L. & SOC'Y REV. (Feb. 1974) (forthcoming).

109. P. 235.

This, too, may involve a number of institutional variables:

(a.) The extent to which the legal institution is differentiated from the larger society. Such differentiation will determine how social norms, and the attitudes of the particular disputants, influence the proceeding.

(b.) The social distance between lawyer and client. The diligence with which a lawyer represents the interests of his client may vary inversely with the social distance between them; on the other hand, ideology may influence a lawyer to display unusual energy in order to demonstrate that loyalty to his lower status client outweighs competing loyalties to his legal brethren, both lawyer and judge.

(c.) The extent to which a lawyer's professional status and income depend on what he can achieve for his client. This will in turn vary with the nature of professional training, the structure of the profession, the number and kind of issues resolved at the hearing, and the way the lawyer is compensated for his work.

(d.) The role definition of the legal professional who hears the case. Domestic relations judges may seek to overcome their low status by imitating the style of other judges, for instance those on the criminal bench.[110]

(e.) The career structure of the judiciary. This may make the bench unrepresentative in terms of age, ethnicity, socioeconomic class, etc., thereby skewing the values judges bring to the task of adjudication.

These institutional variables, to some degree implicit in Rheinstein's propositions, contribute to our understanding of behavior *within* the legal arena. But Rheinstein fails to explore the factors that influence when marriages will be brought within the purview of that institution. We might formulate a tentative hypothesis that:

> 5. The frequency with which marriage behavior is brought within the legal institution will depend on who has the responsibility to do so, the incentives that person has for doing so, and his resources relative to the costs of doing so.

The variables on which this proposition rests include:

(a.) Who initiates legal inquiry into the condition of a marriage. Unlike the criminal law, this responsibility rests largely with the parties, not the state. As between the parties, we know empirically that the vast majority of divorce proceedings are begun by wives.

(b.) The incentives for recourse to law. We are concerned here not only with the goods which the legal institution dispenses—the right to remarry, financial support, division of property, rights to children, moral

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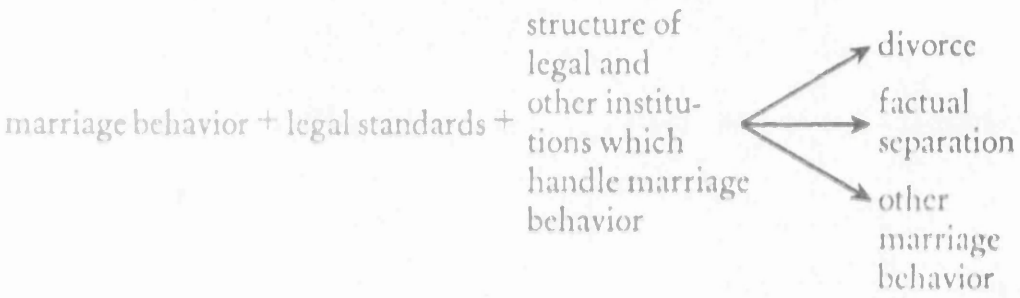
110. I have heard, thirdhand, that a conference of state court judges objected to a scheme of no-fault divorce because it would reduce them to administrators. Of course, they are administrators now, since few divorces are seriously contested, but such a law would constitute open acknowledgement that they do not perform an adjudicative role.

vindication—but with the way in which people perceive these goods and value them relative to the goods offered by other institutions.

(c.) The relative accessibility of the legal institution. This includes cost, location, and social and cultural distance of the court, the necessity of legal representation, and (if such representation is necessary) the cost, location, and social and cultural distance of lawyers, as well as their attitudes toward substantive rules and legal procedures. Again, popular conceptions of the values for these variables are more important than the actual values.

This brief and necessarily superficial review of the institutions which administer divorce law leads us to reformulate our model once more to incorporate their structural variation.



C. *Cultural Climate as an Explanation of Law*

Two terms[111] in the model have not yet been subjected to analysis: marriage behavior and legal standards. Rheinstein states explicitly where he intends to look for an explanation of the latter.

> [I]n the field of divorce, we find a bewildering variety, in the substantive laws, in procedures, and in actual practices. Why . . . ?
>
> The answer lies, of course, in the diversity of social factors by which the patterns of the various societies are determined. Among these factors ethical and religious value judgments are as important as, or even more than, objective facts of social, economic, and political development. These value judgments are widely held without conscious reflection or rational deliberation. They may be felt deeply or professed superficially. Upon the living they have been implanted in that process of acculturation which has shaped the civilization of those successive generations by which civilizations have been built and developed.
>
> In Western civilizations two trends can be traced, two sets of drives, ideas, and ideals which have shaped our present institution of monogamous marriage including divorce. The struggle between and intermingling of these two trends has brought about results which have varied from time to time and which now vary from place to place. One of these two trends has prevailed for centuries. In recent decades the pendulum has come to swing in the direction of the other,

111. Legal institutions, which were just used as an explanatory variable, could, of course, be explained as well. I will not do so here because of the limits of space, the possibility of an infinite regression, and because Rheinstein provides no material with which to do so. Elsewhere I have offered the beginnings of a theory of dispute institutions in society. *See A Comparative Social Theory of the Dispute Process*, *supra* note 108.

but there has not been a complete reversal of the ideas that have been dominant for the last fifteen hundred years.

The two competing ideologies may be called the Christian-conservative and the eudemonistic-liberal.[112]

This adds a new element, which Rheinstein calls variously values, attitudes, ideology, and cultural climate. He defines it as follows:

The term "cultural climate" is used here as a shorthand reference to the totality of subjective and objective phenomena by which the culture of a society, its style of living, are determined. The cultural climate of medieval Europe was different from that of the mid-twentieth century. The cultural climate of Communist China differs from that of Western Europe or North America. To lesser degrees, the cultural climate of Sweden differs from that of Italy, that of Maine from that of California.

Theoretical analysis of the concept of cultural climate belongs to the field of social psychology. What we mean by the cultural climate as related to marriage stability and the divorce law is demonstrated by the concrete illustrations presented in the preceding chapters.[113]

I would like to concentrate first upon certain theoretical problems which originate with the choice and definition of this concept, not simply to carp, but because they illustrate the extreme difficulty of meaningful explanation, and the seductiveness of less taxing modes of exposition.

Every scientific concept must have meaning, that is, an unambiguous content stipulated by definition and thereafter clear to all who encounter it. Cultural climate does not. Indeed, Rheinstein offers no definition: his attempt to define by reference to prior use seems to me an abdication of responsibility which merely increases confusion. The following examples of cultural climates which Rheinstein claims to distinguish illustrate that confusion:

In Japan, the sacred institution has been patrilineal succession, the permanency of the male line maintaining the tradition of the house and the worship of the ancestors. Marriage supplemented by adoption, has been the device by which the continuance of the male line is secured. The wife, it is true, entered the house of the husband, but there was no reason why she should be kept in it if she turned out to be barren or otherwise unsatisfactory. To replace her in the interest of the house involved no moral stigma. As the old adage said: "The womb is only borrowed." In such a system it was self-evident that a marriage could be unilaterally terminated by the husband.[114]

The [Roman Catholic] church [in post-World War II Italy] has also firmly maintained the traditional image of the family within which the principle of indissolu-

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112. Pp. 10–11. This last concept is more familiar to us as utilitarianism.

113. P. 285. This seems to me to be a paraphrase of the concept of *Zeitgeist*. *See* F. SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (A. Hayward transl. 1831); Kantorowicz, *Savigny and the Historical School of Law*, 53 L.Q. REV. 326 (1937).

114. P. 124 (footnote omitted).

> bility is tenable: that of the closely knit patriarchal unit whose primary purpose is the procreation and education of issue and in which, as in society in general, the roles and rights of men and women are unequal.[115]

While I would not deny that the value systems which Rheinstein attributes to Japan and Italy differ in significant detail, they nevertheless share the following basic characteristics: patrilineality, patriarchalism, male supremacy, and the primacy of procreation over other familial functions. Yet Rheinstein calls the first set of values liberal and the second conservative,[116] and uses this distinction to explain easy divorce in Japan and the prohibition of divorce in Italy. Unless we can assign an expression of value unambiguously to one of the two opposing ideologies *before* we look at the legal standards, we can never verify the assertion that an ideology explains a legal standard. Rheinstein's failure to define the ideologies is an invitation to post factum interpretation.[117]

An explanatory concept must also be clearly distinguishable from the phenomenon it seeks to explain; violation of this precept will reduce explanation to tautology. Tautology is almost inevitable, therefore, once Rheinstein has defined cultural climate as "the totality of subjective and objective phenomena by which the culture of a society, its style of living, are determined."[118] Such a concept is fatal to the goal of understanding; for if cultural climate is the totality, what is left for it to explain? Rheinstein's book often falls into this tautological trap. "Explaining" the Italian Civil Code of 1865, he writes:

> [M]arriage was henceforth to be indissoluble for all Italians, including the small group of non-Catholics. The principle of indissolubility seems to have corresponded with the spirit of the times. There was no powerful public demand to introduce an institution which was alien to the tradition of the Catholic nation . . . .[119]

No clear distinctions are drawn between the Code, the spirit of the times, public demand, and the tradition of the nation. Unless these concepts can be measured separately one cannot explain another, for it may *be* that other.

Another problem is not merely definitional, and thus easily remedied, but inheres in the concept of cultural climate itself. Explanation in terms of ideology is a mode of telic reasoning in which ideological goals become the purposes which explain institutional action. Two examples may illustrate the drawbacks of this approach. Rheinstein explains legislative reform in Sweden, Denmark, and Norway as follows:

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115. P. 188.

116. *See* note 112 *supra* and accompanying text.

117. *See* Merton, *The Bearing of Sociological Theory on Empirical Research*, in READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES 465, 473 (M. Brodbeck ed. 1968).

118. P. 285. This emphasis on totality is characteristic of historical and contextual description—intellectual forms which Rheinstein frequently practices.

119. P. 162.

> All three countries were ready resolutely to reshape their laws in accordance with the new spirit. A clear insight into the key role of the family resulted in the choice of family law as the first topic to be reformed, just as family law, together with the land law, was to be the first field to be reshaped in post-World War II Japan, or as it is now being reshaped in the countries of Africa and Asia.[120]

Similarly, he explains both stagnancy and change in the legislature and courts of New York:

> Nobody wished to waken the sleeping dogs and through open discussion disturb the long-standing compromise. But, at last the changing cultural climate broke the equilibrium between conservatives and liberals and when, in 1965, the state's highest court openly revealed the inanity of the strict law of the New York books, the way was opened for the reform law of 1966.[121]

In each of these examples a goal is postulated—social reform, political tranquility, an end to legal hypocrisy—in order to explain some behavior—legislative action, legislative inaction, judicial action. But the attribution of institutional purpose is a risky enterprise. The institution, after all, does not have a purpose; only the individuals who compose it have goals, which are always to some degree divergent and often diametrically opposed.[122] Confronted with this difficulty, Rheinstein makes no real effort to ascertain purpose empirically. Instead, he uses the multiplicity of divergent individual purposes which contribute to the complexity of institutional purpose as a convenient excuse for post factum interpretation. When the evidence of purpose is taken from the law to be explained, compounding post factum interpretation, tautology, and conceptual fuzziness, analysis truly grinds to a halt.

> In the United States the compromise of legal duality [between a strict law on the books and a liberal law in action] must be maintained as long as conservatism is sufficiently powerful to prevent liberalism from coming to the fore. Does that situation still exist today, in 1971? Much seems to indicate that conservatism has weakened to the point of allowing the liberalism of the law in action to be recognized and find expression in the law of the books. For the advance of liberalism and the retreat of conservatism evidence can be found in both the life of the country in general and in recent developments of official divorce law in particular. But the recent developments in the divorce field also indicate that conservatism is still a power to be reckoned with.[123]

Existing legislation is explained by conservative ideology evidenced by the legislation; incipient legislative reform is explained by liberal ideology

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120. P. 138.

121. P. 353 (footnotes omitted).

122. Stinchcombe has criticized this rejection of institutional value as a useful sociological concept and has suggested ways to measure it. *See* A. STINCHCOMBE, *supra* note 83, at 184 n.16. What I object to in Rheinstein is not the concept, but the failure to construct a measure of institutional value independent of the institutional behavior it is offered to explain, so as to avoid the risk of tautology.

123. P. 258.

evidenced by that reform; the anticipated limits of reform are explained by a mix of ideologies evidenced by those anticipations. This is description and speculation, not explanation.

It is not surprising that legal scholars are attracted to telic reasoning; I argued earlier that it constitutes the prevailing rationalization of our legal system.[124] Moreover, social science is often equally uncritical in invoking such images to explain institutional behavior, as I indicated in my analysis of the organic fallacy.[125] Indeed, we all find it difficult to avoid telic expression completely, for ordinary language and thought are filled with characterizations of purposive behavior. But it is vitally important to recognize that the attribution of purpose is rationalization, not scientific explanation. Conscious of this, we must strive to limit our use of purpose to where it may be most fruitful—in the generation of hypotheses—and then scrupulously reformulate those hypotheses by means of concepts that more readily allow for verification.

Let me turn now from these fundamental requirements of social analysis to consider the substance of Rheinstein's explanation—how he uses ideology to understand law. To some extent I will have to tease hypotheses out of a variety of scattered, basically descriptive statements.

6. At least in the western world, the two opposed ideologies set the outer limits for substantive legal standards: limits of what can be conceived (cognitive) and what can be valued (normative).[126]

7. "[E]xperience seems to indicate that human beings differ in their basic attitudes and that it has been due to their divergency that laws of divorce have so often been expressions of compromise rather than of the consistently rational implementation of a clearly conceived policy."[127]

Responding to the cautions urged above, it might well be possible to devise an independent measure of "basic attitudes" and test whether the law at any given time does express their relative strengths. It might also be worthwhile to test Rheinstein's belief that neither attitude can be wholly eliminated from consciousness—the belief which leads him to dismiss radical reform as naive utopianism.

8. Ideology is acquired and held irrationally; it is not altered by reasoned analysis.

Rheinstein asserts this point very firmly. "Religious faith does not need evidence. A tenet of faith cannot and need not be proved. Its force is beyond

124. *See* text accompanying notes 51–54 *supra.*

125. *See* text accompanying notes 58–61 *supra.*

126. *See* text accompanying note 112 *supra.* This limitation to the Western world is Rheinstein's, not mine. Although a comparativist, he deliberately excludes certain non-Western societies from his scope. P. 413. Rheinstein explains that such cultures are "totally different from ours." If that were true, I would think it all the more reason to include them in developing our theories; Rheinstein's parochialism is unjustifiable.

127. Pp. 196–97.

and above reason. So, too, is a secular faith held as a basic world view."[128] Yet elsewhere he displays considerable ambivalence, pointing to scientific and philosophical progress as an influential factor in the history of ideology.

> With the renewal of Greek and Roman learning [in France during the Enlightenment], memories of the dissolubility of marriage among the ancients were rekindled. With the growing emancipation of thought from religious dogma and precept, new ideas about man and his role in society and in the universe began to develop. Nature, along with Holy Writ and, later on, without or against it, came to be consulted as to what would be the natural system of law by which men were to live.[129]

> [In America, at the turn of the century, the] certainty of the belief in the universal necessity of traditional Christian morals was shaken by social scientists like William E. Lecky, comparatists like Henry Maine, and literary men like Henrik Ibsen, G. B. Shaw, or H. G. Wells. Doubts as to the effectiveness of legislative efforts to repress divorce were raised by the findings of social science, which was coming to maturity.[130]

It is impossible to reconcile these statements, which appear to be produced by alternations of optimism and pessimism.

In the end, however, Rheinstein is extremely cautious in his expectations about ideological change:

> We cannot exclude the possibility of some cataclysmic event by which the current trend toward liberal individualism might be reversed. The country may be devastated by nuclear attack, conquered by an enemy, or shaken by revolution. A prophet may kindle religious fervor among the masses; a dictator may use the tools of propaganda to establish a new creed. All that is possible, and in the sequel the cultural climate of the country may be profoundly affected. But as long as we have an even moderately peaceful life or more or less traditional American democracy, nobody has it in his power to reverse the direction in which the cultural climate has been developing.[131]

I hope it is not unfair to summarize Rheinstein's perception of ideology in the following propositions:[132]

9. Ideology is relatively autonomous in its development, barring catastrophes.[133]
10. Ideological development occurs according to an internal logic.
11. Change in ideology is slow and continuous.
12. Because neither of the two basic attitudes can be wholly eliminated, the prevailing ideology is a compromise between them which is constantly pushed in one direction or the other, producing a pattern of change that is cyclical.

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128. Pp. 253–54.
129. P. 199.
130. P. 48.
131. P. 408.
132. The gist of these propositions adds little to the views advanced almost 70 years ago in A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (1905).
133. This seems to be a paraphrase of the old chestnut, "you can't legislate morals."

What is most striking to me about this notion of ideology is its extreme divergence from what I understand to be the characteristics of positive law, indeed, its total inversion of those characteristics. There are no limits to the forms that positive law can assume; it can express a single absolute value rather than compromising among several; contemporary lawmakers claim to pursue ends in rational fashion; and law is certainly not autonomous—it changes at the whim of judge or legislator, often quickly, with abrupt reversals of direction and according to no clear pattern.

What, then, is the connection between these two disparate phenomena; how can ideology explain law? One gets a sense from the book that Rheinstein would like law to mirror ideology, for then law would become an effective means to control behavior and the gap problem would be solved. At times he even appears to suggest that the divergence between them is merely a consequence of the failure of lawmakers to perceive ideology correctly, or to follow it conscientiously.[134]

But this completely misconceives the relationship between law and ideology. They differ in content because they are different in nature, fundamentally and unalterably. First, there are differences in form and function among public ideology, private norms, written legislation, oral judicial opinions, etc., which result from differences in the settings in which each kind of standard is formulated and held. Second, and more important, positive law is an expression of power as well as ideology. Rheinstein is certainly not ignorant of this, but his discussion of power is grossly inadequate. In the United States and other "representative" or "mass" democracies, he sees power as a reflection of numbers.

> In a system of representative democracy the political compromises are supposed to be worked out in the legislative bodies, in whose committees constant efforts are made to achieve the widest accommodation to minority interests that is possible in the circumstances. At times, certain minorities, especially ethnic, have not been sufficiently organized to express themselves in the legislatures and other policy-making organs. Such minorities, as at one time labor and now the Negroes and sectors of student youth, have long been quiescent. When they awoke to political consciousness, they resorted to spectacular devices to strengthen their own solidarity, to attract attention, and to demonstrate the dangers that might follow continued neglect of their demands. Once the street parades, strikes and acts of violence have served their purpose, the group is incorporated in the body politic and participates in the never-ending process of working out compromises. Such, at least, has so far been the course of American political life. The question of whether it will continue thus to function is not pursued in this book.[135]

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134. Rheinstein explains the "liberal breakthrough" in New York as follows: "But, at last the changing cultural climate broke the equilibrium between the conservatives and liberals and when, in 1965, the state's highest court openly revealed the inanity of the strict law of the New York books, the way was opened for the reform law of 1966." P. 353 (footnotes omitted). Once the legislature was helped by the court to see the new ideology, it changed the law to conform to that ideology.

135. Pp. 252–53.

The final sentence renders inescapable the conclusion that this is not a proposition about how the political system works, but a value—an assumption which Rheinstein is not willing to expose to critical examination. Furthermore, he offers us little guidance in determining whether or not a given society is a mass democracy in which power is measured by numbers:

> Both Sweden and the United States are fully established democracies, but Sweden is not a mass democracy. Traditionalist elements are still conspicuous in Sweden, among the upper classes and, even more so, among the peasantry. In a country of mass democracy such elements may be able to prevent the liberalization of the divorce law of the books. If in such a country liberalism is strong, the compromise will be worked out in the courts rather than the legislature and the law in action will cease to correspond to the law of the books. This is what has happened in Germany, in France, and in the United States. In Sweden, political life is determined by a *valentior pars* which is almost uniformly liberal and whose foothold on political leadership is so firm that it can disregard nonliberal views held by even sizable segments of the public.[136]

This definition of the political structure of a society is unfortunately tautological: the relationship between law and ideology is made to depend on whether the society engages in mass or elitist politics; but that in turn is determined by the degree of congruence between law and ideology.

Although Rheinstein's attempt to understand the legal standards of society thus seems to me to fail, it nonetheless serves to point to further elements which must be included in our model:

$$\text{ideology} + \text{power} + \begin{matrix}\text{structure of the}\\ \text{legal institu-}\\ \text{tions that}\\ \text{declare standards}\end{matrix} \longrightarrow \text{legal standards}$$

It is noteworthy that once we add these variables our expectation about the gap changes: ideology will differ from legal standards in all but the limiting situation where power and structural variables are negligible.[137] The significant question for books about law then becomes the way in which different configurations of power and institutional structure produce different relationships between ideology and legal standards. Rheinstein does not address that question.

D. *Cultural Climate as an Explanation of Behavior*

Rheinstein's empirical studies led to the falsification of his initial proposition that the content of the substantive law of divorce determines the

136. P. 155.

137. Power can be ignored where it is distributed equally to every member of the population—in fact, and not just in political ideology. The structure of legal institutions can be ignored where these institutions are in no way differentiated—when, that is, they no longer have an autonomous structure. I deal with this latter point at greater length in *A Comparative Social Theory of the Dispute Process*, *supra* note 108.

incidence of such behavior as divorce, factual separation, and other forms of marriage breakdown. Rather, he came to see law as apportioning marriage behavior among those outcomes. Where, then, does he look for an explanation of marriage behavior itself? The quotation with which I began the previous section[138] suggests that Rheinstein again resorts to cultural climate. This use of a single variable to explain both behavior and legal standards is consistent with the expectation of homology between them, a belief that the gap is an anomaly which may be eliminated. Yet Rheinstein does not maintain that position; on the contrary, he sees cultural climate as producing quite disparate results:

> [T]he inclination to break up a marriage and to yield to such temptation is, like the opposite attitude, a result of those views and circumstances which in their totality make up the cultural climate of a given society. The divorce law, too, tends to be influenced by the cultural climate. However, the degree of strictness or liberality of the law does not always or necessarily have fully to correspond with the actual behavior. The cultural climate may be so complex that it affects actual marriage stability in one way and the configuration of the law in another.[139]

Here Rheinstein appears to concede what I argued in the previous section, that cultural climate is not a single unitary concept which leads to similar consequences under similar conditions, but a category of concepts, each of which produces its own characteristic, often divergent, results. And indeed, when we look at the content Rheinstein gives cultural climate, we find that it consists of two fundamentally different ingredients. Often it refers to the mental state of the actor; the use of ideology to explain legal standards was one example, and we will see others below. But elsewhere, despite Rheinstein's insistence that "ethical and religious value judgments are as important as, or even more than, objective facts of social, economic, and political development,"[140] it is the latter which he invokes to explain behavior.

The first of these approaches, the attempt to explain individual behavior in terms of individual motivation, is troubled by the same theoretical problems I raised in the previous section, even though here they are less obvious. We are all aware that our own behavior is goal directed and we use that awareness to interpret the behavior of others by assuming that they hold similar goals. Such imaginative identification is, of course, a cornerstone of literature, and in the hands of a sensitive artist can wonderfully illuminate human behavior. At the very least, however, it does require empathy with the person whose behavior is being explained, an empathy which can overcome our natural egocentrism—the interpersonal equivalent of ethnocentrism. Rheinstein's values drastically constrict his ability to empathize,

138. *See* text accompanying note 112 *supra*.
139. P. 284.
140. P. 10.

biasing his understanding in favor of men over women, the old over the young, the average over the deviant, the middle class over the poor or the rich, etc. The following is an extreme but certainly not unique example of his insensitivity:

> Efforts made through the administration of welfare laws to achieve higher regard for the sex and marriage code of white society have produced some results, but they are weakened by the resistance of the protagonists of Black Power and the allegedly different cultural needs of what is called the black community. The growing strength of these tendencies among young Negroes is likely not only to counteract but to overbalance the eagerness of middle-class Negroes to adopt the standards of the white majority. The liberalizing influence which Negroes have had upon the cultural climate of the nation through their sex-stimulating music will probably be strengthened if the effort at integration should turn out to be successful. It may decrease, however, if the black sector of the American people comes to live in the scheme of apartheid which now seems to be the aim of some of its leaders.[141]

Even a scholar endowed with the necessary empathy will frequently be lured into post factum interpretation by reliance upon telic reasoning, in part because of the substantial difficulties of verification. I will try to demonstrate this by analyzing one of Rheinstein's explanations:

> While reliable statistics are lacking, it is obvious that long before the Civil War divorce had become a common phenomenon of American life. . . .
>
> While the incidence of divorce was high, it does not appear excessive if one considers the great extent of migration. Change of environment, often of an entire way of life, involves a temptation to be free of old ties of marriage and to establish new ones in the new community. Divorce was not the only device to open the door to remarriage. If communications are poor and registration of the populace is rudimentary or nonexistent, the male migrant who has left his wife behind may easily forget his intention to let her follow at a later time, and he may go through a new ceremony of marriage, or simply establish a common-law marriage with a new partner in his new place, without first having resorted to divorce. He is, of course, a bigamist. Nobody knows the number of undiscovered cases of bigamy. There is no doubt, however, that it is high, and that it was much higher in the nineteenth century when registration of civil status was rudimentary in the United States and disappearance was an easy substitute for divorce.[142]

Rheinstein seeks to explain the conjunction of high rates of divorce, factual separation, and bigamous remarriage or cohabitation on the American frontier by attributing a motive to the frontiersman, the "temptation to be free of old ties of marriage and to establish new ones in the new community."[143] But suppose another analyst observing the same behavior was to offer any of the following alternative explanations: the experience of the

141. Pp. 411–12.
142. P. 35.
143. *Id.*

frontier changed men so radically as to create a fundamental incompatibility with the wives who stayed behind, and couples mutually abandoned a marriage which had become an empty shell; men who went to the frontier were misfits in the old society to begin with, and were fleeing an empty marriage which had broken down because they had never been able to fulfill the expectations of their wives; the wives left at home were unwilling to tolerate the separation and renounced the marriage; the ethic of the frontier idealized a view of manhood which was inconsistent with the roles of husband and father.

How is the reader to choose among these conflicting interpretations? The only criterion offered is his *own* empathetic understanding—neither the actor in history nor the individual in an alien society can be confronted and asked what his goals are. Radcliffe-Brown called this the "if-I-were-a-horse" argument after the "story of a Middle West farmer whose horse strayed out of its paddock. The farmer went into the middle of the paddock, chewed some grass, and asked himself: 'Now if I were a horse, where would I go?' "[144] If farmers offer different guesses, there is no basis upon which to prefer one. Hypotheses which are verified by the same means which led to their formulation are not verified at all.[145]

It is not clear whether Rheinstein is even interested in verification; having postulated the explanation of behavior, a priori, he also postulates the behavior it is intended to explain:

> While reliable statistics are lacking, it is *obvious* that long before the Civil War divorce had become a common phenomenon of American life. . . .
>
> . . . Nobody knows the number of undiscovered cases of bigamy. *There is no doubt*, however, that it is high and that it was much higher in the nineteenth century . . . .[146]

Rheinstein's analysis is really a form of legal rationalization, a mode of thought produced by the determination to make an assertion, to reach a decision, whether or not there is adequate information. Legal professionals are commonly forced into such a situation by external constraints: the lawyer or trial judge who must ascertain the facts of the case and make a prediction about the behavior of the actors; the appellate judge, legislator,

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144. M. GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY 2 (1965).

145. Other modes of verification are conceivable. If we were able to obtain the frontiersman's diary, or the letters he wrote home, we would have a measure of his state of mind that was independent of his actions. I am dubious about the value of such explanation, however: the goals that can be identified are commonly so general that they could motivate almost any behavior; the behavior is so complex that it could further numerous, conflicting goals. I would prefer to rephrase the hypothesis so that it allowed of verification without inquiry into the immediate motivations of the actors. Thus I would want to know whether men on the frontier, or their wives at home, actually remarried, and whether those marriages lasted; and I would want to compare the behavior of couples separated by migration with the behavior of couples not so separated.

146. P. 35 (emphasis added).

or administrator who must frame broad policy without the necessary statistical data. Each of these frequently resorts to the same device: he assigns a motive to the individual or group consistent with their actions, and then deduces actions from that motivation. Motive and behavior reinforce one another in a circular, but artistically satisfying, manner. This is not explanation. The scholar is fortunate in being protected from the pressures to reach conclusions without adequate data; he should resist any temptation to do so.

Despite his assertion of the primacy of values, Rheinstein does look beyond individual motivation for an explanation of behavior. He begins by referring to major social forces that act throughout a society and even across widely different societies, such as urbanization, industrialization, war, and anomie.[147] Concepts this abstract require careful definition if they are to be meaningful. Were we, for instance, to determine empirically that a period we chose to characterize as one of increasing industrialization also exhibited more instances of marriage breakdown, would we really know anything? Which of the multitude of variables related to industrialization would be responsible for the change in behavior? Rheinstein clearly perceives the extreme complexity of the process of industrialization for he believes that it may, in the future, cease to be a cause of marriage breakdown, and ultimately even contribute to marriage stability.[148] Yet he does not attempt to circumscribe the notion, nor does he select among its numerous constituent ingredients. A concept cannot explain when it is neither bounded nor analyzed, and when it can produce such inconsistent results.

Elsewhere Rheinstein does suggest concepts that mediate between the abstractions of industrialization or urbanization and data that may be concretely observed.

13. Marriage breakdown is positively correlated with a change from institutional to companionate marriage. This change may be measured in two ways.
    (a) The extent to which the family has lost functions which it previously performed, such as
        (1) alimentation
        (2) education
        (3) production
        (4) recreation
    (b) The extent to which it has come to monopolize the function of emotional sustenance.[149]

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147. Pp. 120 (Japan), 134–35 (Sweden), 188 (Italy), 240 (Russia), 320 (England).

148. *See* pp. 422–23. *See also* p. 120 n.26. Here, as elsewhere, Rheinstein echoes the faith of the progressives. William O'Neill writes of James P. Lichtenberger, one of the first two scholars to study divorce empirically: "He believed [that divorce] was a temporary phenomenon produced by the industrial revolution and the emancipation of women. Once this transitional period was over, the family would be reconstructed on the basis of perfect freedom and equality." W. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA 180 (1967); *see* Lichtenberger, *Divorce: A Study in Social Causation* in 35 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW (Columbia Coll. Study No. 94, 1909).

149. *See* pp. 273–74. William Bates has pointed out that in losing the function of recreation,

The concepts in this proposition can be linked logically to the concepts in which we are interested. Thus we might hypothesize that the radical economic and social restructuring associated with the industrial revolution produces a shift from institutional to companionate marriage; and that companionate marriages tend to break down more frequently than institutional ones because the number and variety of ties binding the partners is drastically reduced while expectations concerning the emotional bond, which alone remains, are greatly increased. Furthermore, these hypotheses are framed in terms of variables capable of definition and measurement: the extent to which members eat, learn, play, produce, and obtain emotional gratification inside the family or out; and instances of marriage breakdown as a proportion of existing marriages.

Change in the functional attributes of the family is only one of the social variables which Rheinstein selects from the existing social science literature. The probability of breakdown may be negatively correlated with the age at which the parties marry, for a variety of reasons: expectations about marriage may decrease with age;[150] adverse environmental factors, such as parental interference or economic hardship, may be more easily controlled;[151] or perhaps the psychological traits which lead to youthful marriage also lead to breakdown.[152] The progressive emancipation of women may be correlated positively with marriage breakdown because: women come to share the expectations of men about the marriage relationship;[153] women reject the double standard of morality and exercise the same degree of sexual freedom as do men;[154] and women demand and enjoy better educational and occupational opportunities;[155] as a result of these changes acute uncertainty develops about the role of women and, correspondingly, about that of men.[156] Finally, marriage breakdown may be positively correlated with the direct impact of adverse environmental factors, such as inadequate or overcrowded housing,[157] alcoholism and drug addiction,[158] or catastrophes of health.[159]

If these propositions are unobjectionable, it is because they are wholly unoriginal.[160] In seeking to explain marriage behavior, Rheinstein has

marriage would appear to have become less companionate rather than more. I think this is a legitimate criticism of Rheinstein, and also reveals that concepts like companionate and institutional marriage are still quite amorphous, even though more concrete than industrialization and urbanization.

150. *Cf.* p. 187.

151. *See* p. 414.

152. P. 415.

153. Rheinstein suggests this by implication when he contrasts the present high rate of divorce with a past where "men had easy ways to find satisfactory pleasures outside of marriage, and the women were accustomed to suffering in silence." P. 160.

154. *See* p. 136.

155. *See* pp. 135–36, 272–73.

156. *See* p. 427.

157. *See* p. 333.

158. *See* p. 421.

159. *See* p. 155.

160. Some idea of the immensity of the literature which seeks to explain family behavior by

drawn upon the existing sociological literature, but he has added neither theory nor data. Nevertheless, in recognizing that divorce, desertion, and other forms of breakdown grow out of marriage behavior, which in turn reflects the social environment, he has pointed us toward a further expansion of our model:

social variables ⟶ marriage behavior

E. *Toward a New Model for Books About Law*

In the previous sections I have tried to draw from Rheinstein's detailed descriptions a set of propositions, related to each other by means of more general theory, yet formulated in precisely defined concepts which allow empirical verification. In each section I explored explanations which relate one category of variable to another; thus I analyzed marriage behavior in terms of social structure, and legal standards in terms of ideology. One refinement upon this approach would be to combine several explanatory factors; indeed, I have already done so in urging that legal standards be explained by a composite of ideology, power, and the structure of legal institutions. Other propositions which incorporate multiple variables come readily to mind. For instance, if I were interested in explaining behavior within the legal system, such as the failure of most defendants to contest their divorces, I would look at the following elements: behavior outside the legal system—the fact that divorce is frequently preceded by significant periods of factual separation, and often by abandonment; the legal standards for divorce—the fact that it is an either/or proposition, in which a contest may lead to denial of the divorce to both parties; and the structure of legal institutions—the necessity to hire a lawyer in order to defend. Such a proposition still traces only the most obvious linkages among the variables: legal behavior is explained by other behavior, legal standards, and the structure of legal institutions. But if we look at these elements with a fresh eye we may come upon connections which are less commonsensical, and therefore more interesting. In order to stimulate such perceptions, let me review the categories of variables in what is admittedly a somewhat arbitrary arrangement:

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means of other social variables can be obtained from any of the following: W. Goode, E. Hopkins & H. McClure, *supra* note 55; J. Mogey, Sociology of Marriage and Family Behavior, 1957–68 (1971); *Changes in the Family*, 14 Int'l Social Sci. J. 411 (1962); Hill, *Sociology of Marriage and Family Behaviour, 1945–56*, 7 Current Sociology 1 (1958). Indeed, studies of the family are the largest subdiscipline within sociology.

What is most disappointing about Rheinstein's use of sociological findings is his biased selectivity. In large part he is merely repeating the myths of past generations about the destruction of "the classical family ideal of western nostalgia," unaffected by several decades of revisionist research and theory. *See* W. Goode, World Revolution and Family Patterns 6 (1963).

Rheinstein's anecdotal and unsystematic borrowings from social science are very reminiscent of the landmark article in this field by Karl Llewellyn, *Behind the Law of Divorce* (pts. 1–2), 32 Colum. L. Rev. 1281 (1932), 33 Colum. L. Rev. 249 (1933).

Culture	*Legal standards*
ideologies about marriage	substantive laws of marriage and divorce
Social structure	*Structure of legal institutions*
degree of urbanization or industrialization, distribution of power within society	characteristics of courts, legislatures, city clerk's offices
Behavior outside legal institutions	*Behavior within legal institutions*
varieties of marriage behavior	varieties of marrying or divorcing

We have seen that Rheinstein merely repeats accepted sociological learning about the bearing of social structure upon marriage behavior.[161] If, instead, we consider the influence of social structural variables upon behavior within legal institutions, we may be able to construct propositions of greater novelty. For instance, the educational and economic advances which women have achieved in the last century may not only increase their expectations about marriage, but also permit them greater access to the legal process, to initiate or defend legal actions. The attraction of legal remedies, and thus their use, may also vary with age: the young may be childless, economically self-sufficient and, in a period of rapid change, estranged from prevailing norms; for these reasons they may be uninterested in marriage or, if married and separated, in the legal legitimation of status, in custody, or in support. The old may share these characteristics and also have abandoned the hope for a fresh start in marriage.

All of the propositions analyzed thus far explain behavior in terms of other kinds of variables, but the reverse relationship is certainly conceivable. Rheinstein makes a variety of observations that suggest ways in which behavior may explain legal standards.

> 14. The more that
> (a) judges in granting divorce, or
> (b) people in factually separating
> deviate from the law of divorce, so as to increase the gap between law and behavior, the greater the likelihood that those standards will be changed so as to facilitate divorce.[162]

This proposition is again consistent with Rheinstein's view of the gap as an abnormality which creates pressure for its own elimination with an urgency proportional to its magnitude. However, the proposition combines, and

161. *See* note 160 *supra* and accompanying text.
162. *Cf.* pp. 49–50, 257–58, 353.

thereby confuses, two different gaps which must be sharply distinguished.

The gap between legislative standards and behavior within the legal arena (proposition 14(a)) may well be a force for change. Judges and lawyers are trained in the prevailing legal rationalization: the failure of legal standards to control behavior within the legal system seriously threatens the rationalization; to the extent that deviant behavior persists, and obtains its own normative justification, it also creates a normative conflict which offends another legal value—consistency.[163] If these characteristics of the first gap do stimulate legal professionals to action, they are in an excellent position to effect legislative change.[164]

The second half of proposition 14, however, refers to an entirely different kind of gap, that between behavior outside the legal arena—factual separation—and the prescriptions of positive law. If that gap has any bearing on legal change, the connection is different from, and vastly more complex than, the relationship sketched above; I outline one possible linkage in the following propositions:

163. Rheinstein has deep respect for the law, and highly values consistency between law and practice. The most striking evidence for this is a passage in the book in which he mocks that value, and claims to have made his peace with the gap: "Is not all this make-believe a part, probably an indispensable one, of the compromise that has been worked out silently, one might even say surreptitiously, in the courts rather than openly in the legislatures? As any good compromise should, the compromise on divorce satisfied, although not fully, both sides. . . . The only ones who feel troubled are those occasional academics who view with alarm the hypocrisy of the system, the light-hearted way in which perjuries are committed and condoned, and who fear for the integrity of the law and the respect in which the law and its priests should be held by the public. At one time I was a member of this band. With advancing age I have come not only to accept but to admire the compromise. It has preserved peace in respect of an explosive issue, explosive just because it is an issue between beliefs deeply felt and thus unshakable by discussion and incapable of open adjustment." P.254. The language in which he embraces the compromise seems to me to reveal deep ambivalence. It is still "make-believe" worked out "silently" and "surreptitiously"; elsewhere he wrote of a "conspiracy of silence" and the "shadow world of practice." P. 257. It remains a form of "hypocrisy" which "condones" perjury and imperils the "integrity" of the law. Rheinstein has been brought to accept it only with advancing age. And the levity of his language, in referring to the "alarm" of "occasional academics" who "fear" for the "respect" of the "priests" of the law, hardly belies his concern for these matters.

164. Rheinstein also suggests a corollary to proposition 14(a): to the extent that legal standards do not change so as to conform to behavior within the legal arena, there will be a loss of respect for law. He offers as evidence the attempt of the German Civil Code of 1900 to deter divorce. "In large groups of the population, especially among parties to marriages disrupted without fault, the statutory limitation of the grounds for divorce was felt to be unjust. The authority of the law was thus weakened, and the parties and their attorneys were made to feel they were in a situation of morally justified self-defense. The rise and growth of collusive practices and the courts' acquiescence therein appear to have been essentially caused by this factual situation." P. 303. The notion is a familiar one: nullification of a particular law, whether by evasion or nonenforcement, breeds disrespect for and disobedience to that law, and law in general.

To me, both proposition 14(a) and this corollary seem to derive from "if-I-were-a-horse" thinking, rather than from careful analysis and testing. Rheinstein is a law professor: every article he writes, every class he teaches, depends upon a substantial consistency between norm and praxis. If he were forced to go through such shenanigans, he would be deeply troubled and seek reform, as he has done, or lose faith. But do young lawyers, often confronted with the gap for the first time during their early years in practice, lose their respect for law? What about nonprofessionals: does the party or witness who participates in a divorce have any respect for law in the first place; does his experience deviate from his expectations; do those expectations alter; does his new perception affect his subsequent conduct? I think it is time we saw the warning, "nullification breeds contempt," for what it is—a statement of political ideology—and instead devised methods for testing empirically the consequences, if any, of relative deviation of behavior from law.

15. A change in legal standards will be more probable to the extent that those persons who experience marriage breakdown and/or factually separate come to
(a) perceive their behavior as deviant according to the standards of positive law, and
(b) value the legitimacy or other advantages which attach to legal recognition in the form of divorce.

Rheinstein frequently stresses the importance of social stratification for a proper understanding of the consequences of the gap. He recognizes that in a stratified society law can fully reflect the ideology of only one class and that other classes, whose behavior the law labels deviant, may justify themselves by means of their own values and remain indifferent to the need for a legal imprimatur.[165] Although this situation is potentially quite stable, a number of factors may disturb it and thereby generate the desire for legal change. Revolution may invert the classes, depriving the dominant class of the legitimation to which it had been accustomed. Even without such a violent transformation, social mobility may bring into the dominant class persons who retain their deviant behavioral traits but come to value official legitimation.[166] Cultural changes may be equally significant: the dominant class may itself reject the prevailing standards;[167] the growth of an egalitarian ideology may render legal legitimation attractive to a wider range of people.[168]

Yet the desire for legal recognition is not itself sufficient to secure such legitimation:

16. A change in legal standards will tend to occur to the extent that persons desiring such change also possess the power to effect it.

Here, as before,[169] Rheinstein's analysis of power is seriously limited. At times he sees it as a function of numbers—for instance, when he explains legislative reform in Sweden: "A laboring class appeared and organized itself into a powerful political party. . . . In 1905 the new spirit found expression at the polls. The Agrarian Party, which had dominated the political scene, was defeated."[170] Elsewhere, however, he recounts instances where significant legislation has been passed without obvious electoral support:

> Two years before the outbreak of World War II, the first major reform occurred in the divorce law of England. The Matrimonial Causes Act, 1937, generally known as Herbert's Act, was sponsored by A.P. (later Sir Alan) Herbert, the

165. *See* pp. 160 (19th-century Italy), 199–200 (18th-century France).
166. *Cf.* pp. 268–69 (the United States, as well as other nations).
167. *See* p. 189 (Italy).
168. *See* p. 136 (Sweden). This seems to explain the interest in legal reform recently displayed by a variety of groups whose behavior departs from legal standards—ethnic minorities, women, homosexuals, and youth.
169. *See* text accompanying notes 135–36 *supra*.
170. Pp. 135–36.

> well-known contributor to *Punch*. In his book *Holy Deadlock* (1934) he had held up to ridicule the law and the collusive practices which it invited. When he had himself elected to Parliament from Oxford University, he introduced the private member's bill which, enacted into law, added to adultery the following new grounds for divorce: [desertion, cruelty, insanity].[171]

Herbert himself could not have created a better parody of political power: the apolitical intellectual achieves legislative reform by writing a book, entering Parliament via a special constituency, and introducing a bill which lacks the backing of a political party.[172] I fear that an explanation such as Rheinstein's, which takes democratic ideology as a description of reality, is likely to be far too simple.

At times, however, Rheinstein does take account of social structural variables which affect the kind of legal change a given quantum of power can accomplish.

> 17. Where a group desires legal change and possesses a significant amount of power, it will be able to effect such change in judicial behavior, but not in legislation, unless
> (a) the society is extremely homogeneous, or
> (b) the society, although democratic, is elitist, or
> (c) the change does not involve basic values.[173]

As evidence for this Rheinstein contrasts mass democracies—the United States, France, Germany, which he sees as resting on a precarious consensus preserved by a tacit understanding that issues which involve ultimate values will not be debated in public—with Sweden, a democracy dominated by an elite which is able to lead its mass following; Japan, a mass democracy in a homogeneous society where there is substantial agreement on fundamental values; and Russia, heterogeneous but a dictatorship.

Rheinstein formulated proposition 17 to explain the circumvention of strict divorce law by judges and lawyers. I would disagree with part of it. I see no reason to believe that, under these circumstances, change must invariably occur in judicial practice rather than in legislative standards; quite the reverse may be true. Many of the legal reforms demanded, and obtained, by minority groups—such as racial integration and women's lib-

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171. Pp. 319–20.

172. Indeed, Herbert used it as the basis for a political lampoon: A.P. HERBERT, THE AYES HAVE IT (1938).

173. *See* pp. 251–55. Rheinstein's notion that institutional evasion is more likely in heterogeneous societies has been anticipated in R. WILLIAMS, AMERICAN SOCIETY 372–96 (1960), *referred to in* J. GUSFIELD, *supra* note 37, at 114–15.

Furthermore, here, as in the previous proposition, Rheinstein's concept of power is shaped by his commitment to democratic ideology. According to that ideology, judges and lawyers are supposed to follow the written law enacted by legislators who express the popular will. If they fail to do so, it is necessary to conclude *both* that the legislators do not express the popular will, and that the judges and lawyers do. The latter assumption is so inherently improbable that I can only understand it as a reflection of ideology.

eration—took place in the legislative arena, and the compromise which occurred, or which may be anticipated, is found instead in the judicial or administrative bodies which apply those standards. Indeed, the relatively powerless are frequently conceded legislative reform precisely because they lack power. The proposition also fails to explain those instances in which fundamental issues dividing the population are the subject of legislative debates leading to changes in the law which are observed by the officials who apply them—*e.g.*, divorce reform in New York after 1966, and since then in other American states; abortion reform; the decriminalization of homosexuality. Rheinstein characterizes such occurrences as "remarkable" and "explains" them as indicating a shift in political power;[174] the explanation may well be valid, but again we need an independent measure of power before we can test it.

Here as elsewhere, however, I am concerned less with the accuracy of these propositions as empirical statements than with the way that they require us to broaden our picture of law in society. I argued at the outset of Part IV that to phrase the prevailing legal rationalization in terms of the model:

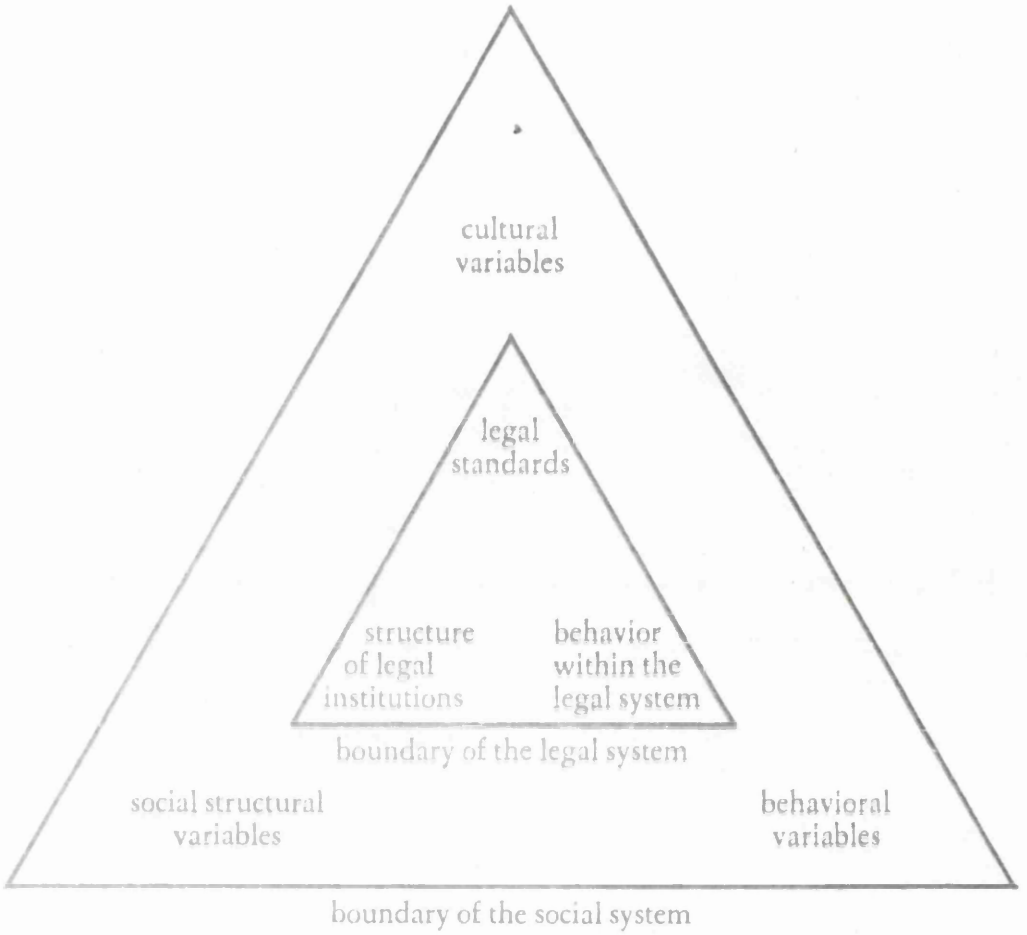
legal standards ⟶ behavior

was to reject it as a description of reality. By a continuing process of statement, criticism, and refinement, we have arrived at our present model, which is nothing more than a schematic representation of the categories of variables listed at the beginning of this section. (See next page.)

The tentative exploration above of a few of the linkages in the model suggests that an explanation of change in legal standards must involve not only the element of behavior outside the legal arena, but also behavior inside it, the structure of legal institutions, ideology, attitudes toward law, and the social and political structure of the larger society. This transformation of our model therefore compels an equally radical transformation of the way in which we define problems for books about law. Rheinstein began with the expectation that legal standards could explain behavior; much of his book is therefore devoted to a discovery that they do not, an explanation for the gap's existence, and recommendations for eliminating it. Our new model contains many more elements, and recognizes the possibility of a wide variety of relationships among them. The gap is merely one such relationship. It is no longer seen as surprising, aberrant, undesirable, and remediable, but rather an inevitable aspect of any real legal system.[175] We are therefore not interested in further rediscovery of its

174. *See* p. 365.

175. I have elsewhere delineated the limiting case in which the gap would disappear, and have explained why it is an ideal type which cannot be found in reality. *See A Comparative Social Theory of the Dispute Process*, *supra* note 108.



existence; the gap ceases to be a satisfactory ending for analysis. Instead it becomes a constituent relationship—not always a significant one—within the configuration of elements which make up the legal system and the environing society. The problem for books about law becomes how to identify alternative configurations, and explain them.

V. Policy

Although I have devoted most of this essay to the development of sociological propositions, Rheinstein himself consistently subordinates his desire to understand to his desire to act. It is to his prescriptions for action that I now turn. In contemporary social scientific scholarship, values commonly direct empirical inquiry toward factual knowledge which influences the creation of policies designed to achieve practical goals consistent with those values. Rheinstein, however, formulates policies which give symbolic expression to his values, while ignoring the substantive findings of his research about the practical consequences of such policies. I will try to demonstrate

this by indicating discrepancies between findings and prescription, noting Rheinstein's failure to test those prescriptions empirically by the criteria he requires for explanation, and suggesting parallels between his prescriptions and values.

Rheinstein concludes unambiguously that legal standards do not significantly influence marriage behavior. Instead he sees both standards and behavior as products of the cultural climate, an amalgam of cultural (ideological) and social (structural, economic, political) factors which are fundamental to the society and not susceptible to easy or rapid change.[176] Among the latter, the massive and seemingly irreversible transformation which accompanies industrialization predominates:

> The process of industrialization involves so much migration, uprooting of traditional modes of living, obliterating of traditional mores, etc. that we must assume almost with certainty that it not only induces people to regularize situations of actual breakdown which have occurred in any case, but it is also a cause, nay, *the* cause, of increased incidence of factual marriage breakdown.[177]

In the heterogeneous mass democracies with which he is primarily concerned, polity and social structure inevitably lead to a compromise between conservative and liberal ideologies which produces a gap between legal standards and behavior.

Had Rheinstein's policies grown out of this analysis, he would have advocated radical social change in order to diminish marriage breakdown or, with resignation, accepted the status quo. But he does neither. He asserts instead that, without changing the cultural climate, "it may still be possible to some, perhaps to a considerable, degree to eliminate or reduce the temptation toward marriage breakup which exists in certain specific situations."[178] He also hopes that, without changing polity or social structure, new legislation "may succeed in eliminating or at least reducing the conflict between the law of the books and the law in action."[179]

Perhaps I can show this lack of congruence more clearly by comparing concrete scientific findings with specific recommendations. The discussion above reveals that Rheinstein offers as explanations for marriage breakdown such consequences of industrialization as functional specialization in the marriage relationship, reduction in the age at marriage, female emancipation, and the environment of poverty. However, Rheinstein's recommendations do not speak to these factors: "For the strengthening of

176. *See* p. 408.
177. P. 422.
178. P. 412.
179. P. 352. This hope is grounded in Rheinstein's misperception of the gap problem. Merton's criticism seems appropriate: "To seek social change, without due recognition of the manifest and latent functions performed by the social organization undergoing change, is to indulge in social ritual rather than social engineering." R. MERTON, *supra* note 63, at 135.

marriage stability, then, effective tools are available. Laws tending to make divorce difficult should not be considered one of them. Social policy and, above all, family counseling and family life education are effective means at our disposal."[180] Of these, only social policy could be considered a response to the environment of poverty. The disjunction between diagnosis and therapy could hardly be more pronounced.

If policy does not proceed from analysis, neither is it subjected to empirical verification. Indeed, Rheinstein himself offers persuasive evidence for the inefficacy of what he recommends. First, he is extremely dubious about the impact of a comprehensive system of state welfare upon marriage breakdown. He notes that: "Temporary setbacks do not seem to increase the incidence of family breakdown. Such calamities as natural catastrophes, war, mass expulsion, or economic depression seem rather to cement family coherence."[181] Hence welfare schemes that protect poor families against such hardships may actually lead to greater disruption. Enduring poverty is clearly destructive of the family, but so too is the enhanced standard of living made possible by industrialization.

> We do not know to what extent, if any, the breakup process among subproletarians is reduced by improvement of social conditions. . . . The reduction of that incidence which is caused by the rise of the bottom groups of society may thus be upset, or more than upset, by the disrupting effects of industrialization. . . . [T]his factor may lose relevance once the society has reached a high level of mature industrialization. . . .
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> . . . .
>
> . . . [However,] more human needs are fulfilled in our time than ever before. Yet dissatisfaction seems also to be more general and more intense. The very fulfillment of once pressing needs has made expectations run ahead of reality.[182]

In the fully industrialized state acute hedonism may represent an even greater danger than want.

Similar doubts are expressed about family counseling. Writing about the Swedish counseling scheme in the descriptive portion of his book he observes:

> Under the law, married people may turn to the conciliator not only as a preliminary to judicial separation and divorce but also for the adjustment of disputes and

180. P. 443. In prescribing education as a cure for ills produced by economics, Rheinstein sounds singularly like a turn-of-the-century progressive. William O'Neill writes of George E. Howard, author of the massive 1904 *History of Matrimonial Institutions*: "Like many others, Howard found the roots of the problem buried deeply in economics, but this did not prevent him from believing that its solution was an educational matter. The apparent discrepancy between cause and cure troubled Howard not at all, for it was central to the whole progressive mystique that there was no social problem, no matter how tangled or complex, that could not be removed if only it were properly understood. Once an enlightened public opinion had been created through education, appropriate solutions would manifest themselves. Right thinking, coeducation, and eugenics would liberate the 'vitalizing, regenerative power of a more efficient moral, physical and social training of the young.'" W. O'NEILL, *supra* note 148, at 175–76. O'Neill goes on to add that "this combination of sex education and traditional moral inspiration was a common recipe . . . ." *Id.* at 183.

181. P. 421.

182. Pp. 422, 428.

> quarrels they may wish to have settled just for the purpose of preserving their marriage. But as little use seems to be made of this opportunity as of its Swiss counterpart, where adjustment of marital quarrels belongs to the judge . . . .[183]

And in the conclusion he adds:

> Judgments about the effectiveness of conciliation proceedings in general and about compulsory conciliation in particular are divided. . . . [I]n France and Germany they are widely held to be of little use . . . .
>
> American conciliation systems have been praised highly, especially by their initiators. But the favorable judgments have also met with skepticism.[184]

Finally, Rheinstein is equally ambivalent about the utility of family life education, which he sees as the responsibility of parents, churches, and schools.

> In this era of cultural change too many parents have lost direction, are unable or unwilling to give guidance, are far from living an exemplary life. Only a fraction of the young have contact with ministers and mostly these contacts are fragile or the ministers are unprepared. Sunday schools also reach but a part and tend to be cursory. So the schools have to step in and to systematize what they have done before. . . . [But i]n the present cultural climate the teachers are as uncertain about basic values as are the people at large. Few are those among them who have the gift of inspiration or the training to do more than instruct in skills and knowledge.[185]

Notwithstanding such realism, he turns around and makes the astonishing claim: "But the schools do have influence, fair play is being developed by athletic coaches, civic responsibility by teachers of social studies, rationality in courses on mathematics, and a good portion of information necessary for successful marriage is presented in special courses of education for family living."[186] Given these doubts about each of the proposals, what evidence does Rheinstein offer to justify his prescriptions?

> If the causes of marriage breakdown are to be kept within bounds, marriage counseling and family-life education are regarded as effective means, together with a comprehensive scheme of measures designed to relieve the individual citizen of those disruptive catastrophes of the economy or of health which experience has shown release a chain of events likely to end in the breakdown of personalities, of marriages, and of homes. *The steadiness of the Swedish divorce rate over the two decades from 1945 to 1965 seems to indicate that these efforts have not been without success.*[187]

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183. P. 148 (footnote omitted).

184. P. 440.

185. Pp. 434–35.

186. P. 435. At the risk of gratuitous overkill, I offer the following observation by Durkheim, who was not only one of the founders of sociology, but also professor of education at the Sorbonne. He wrote, in another context, that education "is only the image and reflection of society. It imitates and reproduces the latter in abbreviated form; it does not create it. The evil [suicide] is moral and deep-seated, and to expect education, which, after all, has but a part of each of its students, and but for a short time, to overcome deficiencies in the whole social order is absurd." E. DURKHEIM, SUICIDE 372 (J. Spaulding & G. Simpson transls. 1951), *quoted in* R. NISBET, THE SOCIOLOGICAL TRADITION 155 (1966).

187. P. 155 (emphasis added).

If Rheinstein's proposals are not sociological propositions about change, derived from his data and subjected to empirical testing, can we say that they express his values? Such an assertion, by its very nature, cannot be proved. Nevertheless, there is a striking similarity between his values and policies. Rheinstein is still interested in strengthening the American family, but he no longer believes that every marriage can be preserved intact until the death of one of the parties. His solution is quintessentially American: marriage has a built-in obsolescence; it should be terminated when it has broken down, *i.e.*, resulted in factual separation; each partner will then be free to enter a new, better marriage, reenacting the American myth of perpetual renewal, the clean slate, and the capacity for infinite progress. "Insofar as divorce opens the door to legitimate remarriage and thus to the creation of new homes free of any taint of illegitimacy, it is a social good rather than an evil."[188] Rheinstein therefore advocates a more liberal divorce law which he hopes will eliminate the gap and avoid the undesirable behavioral consequences of that gap; at the least, it will grant legal recognition to status and approval to behavior, both of which are presently illegal or alegal—marriages which have broken down but not terminated, relationships which have begun but are not formalized.[189]

But what are the consequences of liberalizing the law? At the outset, Rheinstein makes light of the fears of others: " 'Divorce breeds divorce.' This assertion had been made time and again, with deep conviction and without evidence."[190] The empirical studies that he collected or conducted to test the proposition "that easy availability of divorce encourages marriage breakdown" led him to conclude that it does nothing of the sort; it only permits those factually separated to legitimate their separation by divorce.[191]

Nevertheless, with the same deep conviction, and now against the evidence, Rheinstein asserts: "the impression prevails that in modern life marriages are concluded with less consideration than they once were. Unquestionably, the knowledge that in case of failure a divorce can be obtained with ease has contributed to the development of this inclination to take the step of marrying less seriously."[192] He therefore qualifies his advocacy of liberalization with a proposal of other means to control behavior. The means he chooses—especially education and counseling—differ from law in several very significant respects. First, they are preeminently avenues for the expression of value; but unlike law, a gap between preachment and practice does not discredit the whole enterprise. Second, law is constrained by liberal tenets to offer men the freedom to disobey and suffer the penalty.

188. P. 276.
189. *See* pp. 333 (irregular unions), 432 (trial marriage).
190. P. 277.
191. *Cf.* pp. 306–07.
192. P. 419.

Rheinstein recognizes that this is not an effective way to secure obedience. Education and counseling, by altering the values, the goals, and the irrational drives of men, promise to be far more successful.

> Another avenue ought to be explored too: in what ways can we reduce the psychological tensions which may be a source of marriage breakdown even more significant than economic adversity? Such tensions may be created by sexual maladjustment. Education promises to have prophylactic effects. Therapy may be provided by physicians, especially psychiatrists, the treatment possibly through marriage counseling, including premarital counseling.
>
> . . . .
>
> . . . What is needed is a school curriculum in which education for family living constitutes an integral part of all teaching, from nursery school all the way up to college. In play, songs, stories children of every age can be shown what makes and what destroys a harmonious home.
>
> . . . .
>
> The most useful service a conciliator can render is that of making clients realize that their marital difficulties have their roots in deepseated personality defects, which can rarely be corrected in ways other than psychotherapy or counseling extending over some period of time. The conciliation service is therefore successful which makes the clients see that they, and perhaps their parents as well, have to change psychologically.[193]

This approach also allows Rheinstein to place the blame for marriage breakdown upon the human psyche rather than the social structure, and thus to argue for psychological manipulation in place of radical social change.[194]

Rheinstein's choice of the ways to control marriage behavior solves other dilemmas as well. He had found the gap to be inevitable in heterogeneous mass democracies because of the inability of a public legislature to debate and resolve such emotionally charged issues. By contrast, the alternative means of control he advocates are thoroughly elitist, private, and unresponsive to any constituency: psychological counselors are largely invisible to the public, educators can take refuge behind a screen of alleged expertise, and welfare administrators can safely ignore their politically impotent clients. Counselors, educators, and administrators can therefore respond to, or even initiate, change in values without the need for continual compromise. Furthermore, whereas legal standards are expected to be universal and neutral, education and counseling can individualize their treatment of those in different social strata. Welfare administration, of course, only affects the limited segment of the population unfortunate enough to depend on it. "The impact of social welfare measures upon family stability is potentially enormous. Through well-considered use they could constitute an effective device of rational family policy and prove much more effective

193. Pp. 426, 435, 441.

194. Dahrendorf makes a similar criticism of those writers on capitalist society who analyze class conflict within it as "an (almost psychological) phenomenon of 'deviance' from a normal state of integration and cooperation." *See* R. DAHRENDORF, *supra* note 8, at 112–13.

than manipulation of the laws on divorce."[195] Thus the upper and middle classes will be trained to value the desired model of family behavior while the poor, who are culturally impervious to such training,[196] will be induced to conform by manipulations of the welfare system to which they are powerless to object.

VI. Conclusion

Rheinstein's book is, to me, a source of both disappointment and hope. I am disappointed because, despite its claims, it is still a law book with all the limitations of this form. Values are not made explicit, and therefore continue to dominate the research design unconsciously. The problem remains that posed by the legal realists almost 50 years ago: the gap between the law on the books and the law in action.[197] It is approached in an eclectic fashion which fails to face up to the requirements of scientific explanation. The explanations given are often inadequate because they are biased by unstated values, because the questions asked were not theoretically fruitful, and because there was insufficient methodological care. The policy recommendations simply restate initial values, uninfluenced by the findings of research. At the same time, I doubt that Rheinstein's book would please the traditional legal scholar, who will look in vain for original analysis of legal doctrine. The book is therefore plagued by the perennial dilemma of interdisciplinary research: in its attempt to satisfy the standards of two disciplines, it fails to satisfy either, and risks being disowned by both.

Yet the study holds out the promise of what a book about law might be. Although values are not articulated with precision, neither are they hidden behind a facade of neutrality. The problem is stated simplistically at first, but is progressively refined. Notions of what constitutes an explanation are present, even if not scrupulously observed. An implicit theory about the interrelationship of legal and other social phenomena can be found. Empirical data to test that theory are sought outside the law library. The conclusions of the study could be used to formulate policy more intelligently. Only if we can perceive and accept the differences between law books and books about law, and insist that each intellectual enterprise obey its own appropriate criteria, can we advance either, and thereby hope to advance both.

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195. P. 425. A striking example of the manipulation of the politically impotent is the recent sterilization of poor black women in the South by the Montgomery (Alabama) Family Planning Clinic and by Dr. Clovis H. Pierce of Aiken, South Carolina, who was paid by Federal Medicaid. *See* N.Y. Times, July 2, 1973, at 10, col. 1; *id.*, Aug. 1, 1973, at 27, col. 1.

196. "The motivational force of the consideration of social respectability of a new relationship varies among different groups of the population. It tends to be weakest in the bottom economic group. In the present-day United States this group is to some extent characterized by color." P. 279. It is, of course, egregious class prejudice to proclaim that the poor are not concerned with social respectability.

197. This is also the topic for the 1974 conference of the Law and Society Association.

REVIEWS

Comptes Rendus

East African Cases on the Law of Tort. By E. Veitch. (Law in Africa No. 31). London, Sweet & Maxwell. 1972. xxiii, 295 pp. £4·00 (paperback edition available only in Africa, £2·50).

The problem with this book lies in what it is not. I accept that it is generally unfair to criticize an author for not writing some other book—one the reviewer might prefer. But the present author has set forth his own goals and then failed to live up to them. The goal implicit in the title—a comprehensive exposition of tort law in East Africa—is reaffirmed in the Preface:

> "This casebook is intended for students and teachers of tort law in East Africa, although it may be of value to the practitioner because of the unreported material herein, as well as to others interested in the comparative method within the Continent."[1]

In fact, the book consists of extensive excerpts from, and commentary upon, cases from the High Courts of the three East African countries, reported and unreported concerning the *received* law. I have no reason to think that the coverage is other than excellent.[2] But is this "the law of tort" in East Africa? Veitch asserts:

> "The law of tort in East Africa today comprises law of both alien and customary origin; however, while customary law has retained its power in the fields of family law and succession, and to a limited extent, in the criminal law, it cannot be claimed that it has been allowed to exert any real influence on the development of this part of the civil law."[3]

I disagree. I will substantiate my disagreement with data from Kenya, the only East African legal system with which I feel adequately familiar; but I believe my view applies, in greater or lesser degree, to Tanzania and Uganda as well.

The law of Kenya is established by statute:

> "The High Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and not repugnant to justice and morality or inconsistent with any written law . . ."[4]
>
> "A District Magistrate's Court shall have and exercise jurisdiction and powers in proceedings of a civil nature where . . . the proceedings concern a claim under customary law . . ."[5]
>
> "In this Act, except where the context otherwise requires—'claim under customary law' means a claim concerning any of the following matters under African customary law—
>
> (a) land held under customary tenure;
> (b) marriage, divorce, maintenance or dowry;
> (c) seduction or pregnancy of an unmarried woman or girl;
> (d) enticement of or adultery with a married woman;
> (e) matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;
> (f) succession, both testate and intestate, and administration of estates, except as regards property disposed of by a will made under a written law; . . ."[6]

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[1] *East African Cases on the Law of Tort*, p. v (hereafter cited by page number only).

[2] It does, however, seem considerably more extensive for Uganda than for the other two countries; this is understandable in view of the difficulty of collecting unreported materials.

[3] P. 1.

[4] Judicature Act 1967, s. 3 (2).

[5] Magistrate's Courts Act 1967, s. 10 (1) (a).

[6] Magistrate's Courts Act 1967, s. 2.

The precise import of these statutes is not at all clear. The Judicature Act appears to make customary law applicable in all cases where one of the parties is "subject" to it or "affected" by it—vague concepts, but potentially quite broad. The Magistrate's Courts Act, however, enumerates five categories of cases which involve a "claim under customary law".

How will these statutes be reconciled? Will the categories be understood as merely illustrative of the general concept of customary law, or as an exhaustive listing of all possible claims under customary law? The "plain meaning" of the statutory language might suggest the latter interpretation. I would argue, however, that the extirpation of a significant body of indigenous law requires wording that is more explicit, less ambiguous. Certainly nothing in the legislative debates indicates any awareness that the Acts would have this result, though I am told that some government officials had it in mind. When I was last in Kenya in January, 1971, I learned that this precise issue was to be heard by the High Court.[1] The case involved a claim for *kore* (bloodmoney) under Duruma customary law. The District Magistrate granted the award, and the Resident Magistrate denied an appeal which argued explicitly that the lower court had lacked jurisdiction to entertain a "claim under customary law" that did not fall within any of the enumerated categories. I have been unable to find out what happened in the case. But surely this issue should have been discussed in the book; and whichever way it is eventually resolved, Veitch's denial that the customary law has had "any real influence" is hardly correct.

Perhaps his assertion is better explained as an observation about the particular courts he chose to examine. For he admits:

> "The vast majority of cases reaching the High Courts are decided in terms of the received law although the cases coming before courts of inferior jurisdiction and disputes settled in the customary tribunals are determined according to principles of the customary law."[2]

Why, then, did he decide to study only the High Courts? It is understandable, if also regrettable, that a lawyer would feel poorly equipped to study customary tribunals. But whatever the reason for the decision to ignore the lower courts, and it can only be surmised, I think it is mistaken.[3] I believe that the number of cases heard by a category of courts may be used as one index of the importance of those courts in the administration of justice. The following are the most recent statistics I have for Kenya.

TABLE I: COMPARISON OF CIVIL CASES HEARD[4]

	District Magistrate's Courts	*High Court (Original and Appeal)*
1969	47,678	2,957
1968	42,712	2,256
1967	59,110	2,451

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[1] The decision from which the appeal was being taken was: *Kamanza s/o Chiwaya* v. *Manza w/o Tsuma*, Mombasa Resident Magistrate's Civil Appeal No. 8/69 (18.9.70), dismissing appeal from Kinango District Magistrate's Civil Case No. 198/68 (no date). Other claims for bloodmoney had been heard twice before by the court at Kwale. Each was granted, and in each case an appeal was taken to the Resident Magistrate at Mombasa. Different magistrates heard the two appeals, one allowing the appeal, the other dismissing it. See Mombasa Resident Magistrate's Civil Appeal No. 66/68, dismissing appeal from Kwale District Magistrate's Civil Case No. 35/68; and Mombasa Resident Magistrate's Civil Appeal No. 13/69, allowing appeal from Kwale District Magistrate's Civil Case No. 123/68. (The same District Magistrate sits at Kwale and Kinango, which are both within Kwale District and serve the Duruma people.)

[2] P. 1.

[3] I have stated my reasons more fully in a review of Spalding, Hoover and Piper, '"One Nation, One Judiciary": The Lower Courts of Zambia', in a forthcoming issue of *African Law Studies*.

[4] These figures are taken from what was then an unpublished report of the Judicial Department for the years 1966-70.

According to this admittedly crude index, the lower courts are roughly twenty times as important as the High Court. But, it might be answered, the lower courts are required by the doctrine of precedent to follow the decisions of the High Court; therefore it is twenty times more efficient to study only the decisions of the latter. We know, however, that precedent is only a doctrine, not a reality. And Veitch himself, after deploring the inadequacy of law reporting in East Africa, and noting several egregious deviations from precedent, states: "the dangers to systems leaning on *stare decisis* of non-reporting cannot be overlooked".[1] I have elsewhere given my evidence for believing that the lower courts of Kenya are even more erratic in following decisions of the superior courts than is the High Court in following its own or those of the East African Court of Appeal.[2] The customary law of torts applied by the lower courts of Kenya can therefore be understood only by studying the decisions of those courts.

But is that law important? Veitch is sure it is not; his evidence, however, is unconvincing:

> "The tort actions involving elements of customary law which have come before the High Courts in the last decade have been limited to interference with familial relations and damages for fatal accidents. This conforms with the experience of other legal systems in Africa that customary law is strongest in the field of personal law.[3] . . .
>
> Custom is formally guaranteed in the statute books, but it cannot be pretended that the customary law is fighting back with any success against the power of the received law. For reasons which are social, economic and political it is clear that customary tort law will remain limited to such areas as elopement, adultery, seduction and the assessment of damages for personal injuries and wrongful death."[4]

For the reasons given above, I think it is absurd to look at cases brought to the High Court as representative of the kinds of customary law cases involving tort which are litigated in Kenya. Veitch, himself, has already admitted that they are not. How could they be, when the District Magistrate's Courts are easily accessible to almost everyone in Kenya, but the High Court remains the forum of the elite as a result of so many cumulative factors: location, court costs, the need to be represented by counsel, language, subject-matter jurisdiction, cultural differences, delay, etc. And indeed, when we look at an analysis of tort litigation in the African Courts of Kenya for 1966 we see a very different picture.

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[1] P. 7.

[2] See R. L. Abel, "Case method research in the customary laws of wrongs in Kenya, Part II: statistical analysis", (1970) 6 E.A. L.J. 20, 36-50.

[3] P. 2.

[4] P. 3.

TABLE II: FREQUENCY OF KINDS OF CIVIL LITIGATION IN AFRICAN COURTS OF KENYA, 1966[1]

Court (and tribe)	Total Cases	Total Torts	Torts/Cases %	Specific Torts as Percentage of Total Torts: Abuse	Assault	Cattle Trespass	Sexual Rights Unmarried Girl	Sexual Rights Wife	Damaging Property	Damaging Crops	Taking Property	Other
Hamisi (Luyia)	399	119	29	17	5	21	25	4	4	3	6	15
Mumias (Luyia)	364	152	42	21	11	29	8	6	5	11	5	4
Kakamega (Luyia)	613	157	26	20	6	22	21	8	7	4	6	6
Kosele (Luo)	337	62	18	26	6	26	9	—	2	6	24	1
Maseno (Luo)	283	143	51	22	13	12	5	11	2	26	5	4
Kisii (Gusii)	522	216	41	8	13	22	18	8	6	7	15	3
Kiambu (Kikuyu)	530	318	54	18	23	3	41	—	6	7	3	—
Kericho (Kipsigis)	278	152	55	17	58	1	6	—	6	1	7	4
Sotik (Kipsigis)	151	62	41	—	55	30	2	—	3	—	6	4
Kilifi (Giriama)	294	53	32	2	15	2	2	70	—	6	4	0
Kaloleni (Giriama)	316	125	40	13	6	11	1	65	2	—	1	1
Gwirani (Digo)	129	38	30	13	13	5	5	55	—	8	—	1
Kinango (Duruma)	357	53	45	6	5	3	19	54	—	—	9	4
Wundanyi (Taita)	344	115	33	22	5	18	29	3	3	19	2	0
Iveti (Kamba)	539	143	37	15	9	10	13	8	5	29	6	5

This table clearly demonstrates that Veitch is wrong about the importance of customary tort law in two critical respects. First, it *has* had a very real influence upon the development of the law for, in the 15 courts about which I have data, it represents a very significant portion of the total litigation, varying between 18 and 54%, with a median of 38%. Second, it is simply not true that customary torts are limited to interference with family relations and personal injury. As the table indicates, it is impossible to generalize about the kinds of tort action which predominate in the different courts. Thus interference with a husband's exclusive sexual rights over his wife represents 70% of the tort cases in the Giriama court at Kilifi; impregnation of an unmarried girl represents 40% of all tort cases in the Kikuyu court at Kiambu; assault constitutes more than half of all tort cases in the Kipsigis court at Kericho; and abuse accounts for more than a quarter of all tort cases in the Luo court at Doho Kosele. At the least, this heterogeneity falsifies Veitch's generalization.

The data in Table II, however, are from 1966. The following year, as I indicated above, legislation was enacted which may have altered the capacity of the courts to entertain actions founded upon customary conceptions of wrong. But whichever way the High Court ultimately construes that legislation, I have argued that problems of communication with and control over the lower courts dilute the influence of legislation upon the kinds of tort cases those courts are actually handling. Unfortunately, when I returned to Kenya in 1971, I found that legal scholars were no longer allowed free access to court records, as a result of the following memorandum:

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[1] This table is compiled from the record books of the individual African Courts, supplemented where necessary by case records. Because of the difficulty of classifying cases taken from different customary legal systems, it should be read as only a rough indication of the diversity of litigation. It is not even an exhaustive enumeration of customary tort cases, for many cases brought as private prosecutions under the Penal Code also seek compensation according to customary tort law.

"Circular to Magistrates No. 9 of 1969:[1]

High Court Practice Note

His Lordship the Chief Justice has directed that provisions of rule 2 of part 3 of the Rules of Court should in future be strictly adhered to.

This will mean

(a) that application for reference to an archive must be in writing;

(b) that in the case of decided cases a fee of Shs. 6/- must be charged and in the case of pending cases a fee of Shs. 4/- must be charged unless the Judge remits or reduces this Shs. 4/- fee on account of the poverty of the applicant;

(c) the Deputy Registrar in charge of the Civil Section will seek the approval of the Judge prior to granting leave to refer to any archive;

(d) the principles upon which leave may be granted and under which archives may be inspected are set out in rule 2 and will be strictly adhered to;

(e) Magistrates should note that under paragraph 1 'Judge' includes 'Magistrate'."

The research which provided the data for Table II required the examination of many thousands of case records; such research is now rendered prohibitively expensive, even where it is still permitted. It will be impossible in the future to determine anything about unreported litigation in the lower courts. This barrier can only perpetuate the myth that legislation and reported High Court decisions not only prescribe what the lower courts ought to do, but also describe what they are doing in fact. The myth may comfort those who believe, or wish to believe, that customary tort law no longer has any real influence in Kenya; but it is grounded upon deliberate, self-imposed blindness to reality.

Throughout the book Veitch declares himself in favour of the Africanisation of tort law, and decries both the ethnocentrism of colonial judges and the preference for English precedents which has persisted even after independence. But surely no part of the legal system of East Africa is more African than the indigenous customary law. The author's uninformed dismissal of customary law is inconsistent with his self-proclaimed values.

RICHARD ABEL

Spalding, Francis O., Earl L. Hoover and John C. Piper, "One Nation, One Judiciary: The Lower Courts of Zambia", ZAMBIA LAW JOURNAL, Vol. 2, Nos. 1 & 2. Lusaka, Zambia, School of Law, University of Zambia, Box 2379, 1970. xiv, 289 p. $6.00

Upon a superficial glance, the lower courts of Zambia have in common only the fact that they are lower in the judicial hierarchy than the High Court. Consisting of three classes of subordinate courts (the magistracy) and two categories of local courts (urban and rural), they vary widely with respect to almost any significant judicial characteristic: jurisdiction - territorial, subject matter, and whether original or appellate, location, personnel, procedure, and even substantive law. Nevertheless, these courts are usefully studied together for several reasons. The sixty magistrates[1] and approximately 825 local court justices[2] rather outnumber the six High Court judges. It is the former who handle the vast mass of litigation: in 1969 the local courts heard 73,439 cases and the subordinate courts 53,758, while only 2,741 cases were filed in the High Court.[3] One explanation for this disproportion is the fact that the lower courts are geographically and economically far more accessible to the ordinary Zambian: magistrates are located in twenty-nine of Zambia's fifty-four districts, and everyone is near at least one of the four hundred and two local courts; lawyers are not necessary, and rarely appear, and court costs are low.[4] The High Court, by contrast, sits only in Lusaka and a few other cities, and must be approached through an advocate.

Yet despite the predominant role which such courts play in administering justice to the people, legal scholarship has largely ignored them. In the West this disregard has been justified by an ideology which asserts that the lower courts are pallid imitations subservient to their appellate superiors, within

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1. P. 127. (The book under review will be cited by page number only.)

2. P. 175.

3. P. 284.

4. P. 127, 168.

which alone significant judicial behavior occurs. Most African legal studies have unfortunately adopted this view, concentrating on the appellate decisions of the highest court of one or more countries. But the model of a lower court meticulously adhering to precedent in substantive law, and to administrative decree in procedure -- a gross distortion even in western legal systems -- simply cannot be maintained in Africa. For all these reasons, the authors are to be applauded for their decision to study the lower courts, and even more for their recognition that the institutional structure of those courts is at least as important in understanding their operations as are the substantive legal standards which purport to guide them.[5]

Among the possible approaches to the study of legal institutions, three seem relevant here: explication of the legal doctrines which state the norms of operation; description of the ways in which the institutions actually operate; and explanation of such operations as social phenomena. The authors -- a law teacher and two law students -- quite naturally begin with the first of these, and devote more than a third of the book to a history of the statutes relating to court structure and the ideologies which have guided the development of that structure. This is unquestionably a useful starting point: statutes do establish boundaries for action; ideology does influence legislative and administrative change. But the exegesis of doctrine should not become an end in itself, as happens in the last quarter of the book, which analyzes fine points in the jurisdiction of the lower courts. Spalding justifies this excursion as follows:

> An answer to the question whether a court has judicial power is a necessary preliminary to the exercise of judicial power by that court -- at least where the question is raised....

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5. It is interesting to note that, on those rare occasions when legal studies take institutional structure into account, the institution studied is almost always a court. Legal scholars have largely ignored the structure of legislatures, administrative agencies (with the exception of the police and correctional institutions), and the larger society.

> Moreover, unclear jurisdictional rules are both a trap for the unwary and a devastating technical tool in the hands of a skilled practitioner.[6]

But he then admits, with some embarrassment:

> It is true in the Zambian legal system as elsewhere, of course, that jurisdictional rules or dicta in the cases are often overshadowed or obscured by the more compelling substantive issues within which they lie embedded....[T]he jurisdictional aspects do not always appear even in such indices as are available.[7]

> [I]t is remarkable how infrequently questions of conflicts and choices of law have arisen in the cases. Even less frequently, perhaps, has there been any discussion of the question here -- the jurisdiction or power to apply a body of rules of law.[8]

If the issue of jurisdiction is rarely recognized and discussed, the concept would seem to be of singularly little use in understanding judicial behavior. Why, then, does Spalding spend his time analyzing it? Apparently because of the delight he takes in applying the skills of a highly competent American lawyer to virgin territory -- "a subject with complexities enough to suit the most fully developed legal system"[9] -- in an effort to construct a typically American legal product -- "an extensive, reasonably cohesive, reasonably harmonious body of case law of the jurisdiction of courts."[10]

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6. P. 219.

7. P. 221.

8. P. 229.

9. P. 2.

10. P. 220.

The distinguishing strength of this book, however, is that it goes well beyond the preoccupation with refinements of doctrine, on which legal scholarship has generally foundered. More than a third consists of an outstanding description of law in action -- the actual structures and operations of the lower courts. Here we are given exhaustive data, indispensable but nonetheless frequently overlooked, concerning: the number of courts, their location, and relative accessibility to clients and professionals; the physical setting of the courts; the characteristics of such personnel as judges, clerks, prosecutors, and advocates, including their age, experience, training, language skills, and political ties; the career structure of those professionals -- salary, perquisites, opportunities for promotion, transfers; the nature of the business which the court conducts -- overall caseload and kinds of cases; the procedures followed, including interpretation, record keeping, participation of the judge in examination of witnesses, and of the clerk in decision; the length of time required to get a case heard and decided; and the mode of review or revision. Furthermore, this structural skeleton is fleshed out with a narrative account of a day in court in the style of Sybille Bedford[11] or George Feifer.[12]

My enthusiasm for this considerable accomplishment is tempered only by my disappointment that the authors have so unnecessarily limited their ambitions to pure description, and have declined to attempt the third approach -- the explanation of legal institutions as social phenomena. Indeed, they explicitly disclaim such a goal.

> Although the most important part of our study was based upon field interviews, we did not use the full rigorous methodology of the modern social sciences. In part this reflected our own lack of expertise, but in larger part (for we could no doubt have found skilled methodologists to advise us) this is a result of the nature of our inquiry. We began without hypotheses to be be tested, simply because our knowledge (which we think embraced substantially all published

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11. The Faces of Justice: a Traveller's Report (1961).

12. Justice in Moscow (1964).

> learning in the field) was insufficient to enable us to generate meaningful hypotheses.[13]

The reason given for the failure to formulate hypotheses in advance is nugatory. For the authors' boast to have exhausted "substantially all published learning in the field"[14] reveals itself, upon scrutiny, to be grounded either in ignorance or in a philistine rejection of several significant sources of data and theory. First, the lower courts are studied in isolation from other social institutions, even those indigenous equivalents of official legal institutions which perform the same functions of formulating, changing, and applying behavioral norms. I find it incredible that the authors choose to pass over Max Gluckman's classic studies of Barotse legal institutions with a single cavalier footnote:

> The work of Epstein's mentor, Max Gluckman, of course deserves mention....Gluckman, though remarkably sensitive to the legal viewpoint, is not a lawyer; nor were the Barotse courts, during the period of his study at least, really modern courts as that term is here used.[15]

Moreover, the wealth of anthropological literature produced by Gluckman, his students, and others at the Zambian Institute for Social Research (formerly the Rhodes-Livingston Institute) is largely ignored. Second, the authors specifically avoid comparison between legal developments in Zambia and those in other African countries, at least at this stage of their work.[16] Finally, they appear to be unacquainted with the growing body

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13. P. viii.

14. The book displays a disconcerting compulsiveness in several ways: collections of citations and authorities (p. 27, n. 180; p. 28, n. 181); an inordinate emphasis on comprehensiveness and orderliness (p. 29); and a pedantic concern for citation form (p. viii; p. 30, n. 185).

15. P. 31, n. 192.

16. P. 27-28. Data from other countries is used only as a source of ideology for judicial development, pp. 25-119.

of social science theory concerning legal institutions.

These oversights are unfortunate in the extreme. Students of the American legal system increasingly realize that it is impossible to understand that system without paying attention to unofficial or informal legal processes, as well as to the society in which they operate. This is true a fortiori in Zambia, where the governmental legal system is a callow newcomer among the numerous indigenous legal institutions which continue to serve the vast majority of the population. Similarities and differences between Zambia and other African nations fairly leap out at anyone familiar with the relevant literature, and such comparisons frequently serve to generate hypotheses. I was especially struck by the parallel between this study and the superb report by Arthur Phillips on the comparable courts in Kenya three decades earlier -- a report which is nowhere cited.[17] Furthermore, I have found the writings of sociologists and anthropologists an extremely fertile source of hypotheses about judicial behavior -- hypotheses which could well have been used to analyze the data contained in the present study in terms of such concepts as specialization, differentiation, and bureaucratization.[18]

But the authors' modest insistence that they "began without hypotheses" should not be taken at face value. Some notion of what is important must have instructed their decision to collect this data rather than other information. Indeed, it is not possible to engage in intellectual inquiry without hypotheses. It is possible, though ill-advised, to allow those hypotheses to remain implicit rather than stating them plainly. The implicit hypothesis underlying the present study can be seen in the following:

> [Our research led us], perhaps most importantly, into the field, to observe and record some of what actually happens as the lower courts go about their business -- processes

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17. Report on Native Tribunals (1945).

18. I have developed these ideas in an unpublished paper, "Toward a Comparative Social Theory of the Dispute Process" (1972).

> usually consistent with the law, but also in between the law, above and beyond the law and occasionally contrary to the law.[19]

The authors take the official legal standards as a model of what the lower courts ought to be doing, and then look at institutional variables to discern why judicial behavior deviates from those standards. I have elsewhere characterized this as the problem of the "gap" between law on the books and law in action, and have argued that dismay at the gap constitutes the single most prevasive approach in social studies of legal phenomena.[20] Among the many disadvantages of this approach is a disturbing constriction of vision: the researcher is directed toward departures from the legal standard, and thereby distracted from developing a more general theory which would explain the behavior of judicial institutions in terms of the structure of those institutions.

This formulation of the central problem of the study is in turn an outgrowth of the authors' primary interest in recommending policies rather than advancing our general understanding of judicial institutions. Such a concern is entirely natural in a team of lawyers, and is highly commendable when those lawyers are also expatriate scholars seeking to justify their research to their Zambian hosts. But it does create a serious dilemma: what right do American lawyers have to make recommendations for the development of African legal institutions? The authors are highly sensitive to this dilemma, but I do not find their solution very satisfactory. In part they fall prey to the technocratic delusion that it is possible to make policy recommendations without choosing between values. In the final proposal for their study the authors included among their purposes: "To report ... perceived strengths and weaknesses in the operation of these courts.... To analyse as thoroughly as possible and report any operational problems .... To offer any recommendations generated...."[21] But

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19. P. 2.

20. "Law Books and Books About Law," Yale Law Journal (forthcoming) [a reviw article on Max Rheinstein's Marriage Stability, Divorce and the Law].

21. P. 120.

strengths, weaknesses, problems, and recommendations can only have meaning with respect to values. In an effort to avoid imposing their own, the authors look for other sources of value. Some are claimed to have general acceptance, e.g.,

> more or less universal principles of justice -- that is, the rule of law. The widespread veneration given the doctrine of separation of powers suggests that the human attributes which give rise to the problem -- which result, as it were, in poisoning the well of justice -- are of widespread occurrence.[22]

Where such vague slogans fail to offer adequate guidance, and they usually fail, Spalding engages in a lengthy analysis of the myriad recommendations for the reform of judicial systems in Africa in the hope of synthesizing a consensus of views. He succeeds, but only by denying representation to a variety of significant dissenters. His consensus consists of "colonial and independent government administrators, [legal] academicians, and [legal] conferences."[23] It excludes anthropologists, sociologists, and those dissident African politicians who do not manage to become administrators. Surely, if the latter were allowed a voice, Spalding could no longer write so confidently that "everyone talks about professionalization - and favorably."[24]

Where pan-African consensus cannot be achieved, or is embarrassingly mute, the authors try to discern and follow Zambian values. But the same problems persist: whose values to choose among the diversity of Zambian opinion, and what to do when those values cannot readily be identified or are overly broad. In the end they opt for a compromise, justifying it on the ground that it "might achieve the best of both worlds without straining any segment of a society in transition."[25] But even a compromise necessarily represents a choice between values, itself an expression of value.

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22. P. 59.

23. P. 29.

24. P. 52.

25. P. 217.

Once we sweep aside this pretence of value-neutrality, it becomes clear that the values which the authors claim to find in other spokesmen are in fact their own. I believe it is important to state those values as clearly as possible, although I do not claim any standing by which to judge them.

(1) Reform of judicial institutions is important for national development.

> [T]he magistracy has unquestionably made substantial contributions in this period to the overall long-term development of the Zambian legal system -- albeit that the precise nature and dimensions of the contribution are not now easily perceived.
>
> The consequences of success in this respect may not seem large, given the benefit of hindsight; but the consequences of a failure, had it occurred, could have been devastating to much of the rest of the nation's effort toward self-development.[26]

This is an assertion of faith, which is necessary to justify undertaking the study in the first place.

(2) Judicial institutions ought to be unified.

> [W]e convinced ourselves, as have many before us, what an important aspiration it is to Zambia's future development as one nation. In the end our main hope is that our work, embracing as it does the work of so many others, may be of help to those who continue to labour toward the goal --"One Nation, One Judiciary".[27]

(3) There should be a separation of powers between judiciary and executive.[28]

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26. P. 151 (I have reversed the order of these two sentences).

27. P. 3.

28. P. 155, 175, 214.

(4) The judiciary should be professionalized.

> Zambia's history proves that it is possible to have a magistracy composed largely of laymen. But to do so in a modern, complex legal system is a kind of juridical tour de force .... Nothing can argue that that tour de force should be perpetuated one day longer than necessary. Always assuming that Zambian graduates will have a Zambian -- and not a British or American -- legal education, Zambian professionals will be far and away better equipped to handle the duties of the magistrate than will any layman.[29]

When the values are stated in this fashion, I think it can be seen that they express an idealization of the American judicial system.

This study of the lower courts of Zambia, then, though animated by the best intentions and executed with great energy and intelligence, is marred by two flaws common to contemporary legal scholarship. One is the belief that legal institutions can be understood in isolation from other social institutions, uninformed by the insights obtained from comparative data, and in ignorance of the burgeoning theories of social science. The other is the delusion that a scholar can avoid expressing his own values in designing the problems he studies, choosing the kind of explanation he seeks, and making recommendations. But despite these flaws, the report will be an invaluable source of data for the comparative social study of judicial institutions even if, because of them, it is not itself such a study.

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29. P. 156.

Rejoinder to Professor Spalding

Professor Spalding's response to my review is marred by some egregious errors - e.g., his confusion of the concepts of "hypothesis" and "value," which are used interchangeably and often incorrectly. He also indulges in intemperate and inappropriate language, as I believe a careful reading of my review and his reply will show. I hope, however, that the handful of readers whose interest is piqued by this debate are not simply entertained by its rhetoric, but are moved to go and study Professor Spalding's book. If they do, I would ask them to bear in mind the following statements of value (in the sense of subjective, untestable assumptions and preferences) which I brought to my criticism of his book:

1. The exegesis of legal doctrine is only worthwhile if the doctrine has some bearing upon behavior we wish to understand - i.e., if the content of the rules is one of the variables necessary to understand that behavior.

2. The development of a specific policy to solve a narrowly defined social problem, and the construction of general theory, are alternative foci which always diverge to some extent. Every scholar must constantly choose to emphasize one at the expense of the other.

3. More important than either of these decisions is the question of how we may gain the fullest understanding of legal phenomena. In my review I wrote that "Students of the American legal system increasingly realize that it is impossible to understand that system without paying attention to unofficial or informal legal processes, as well as to the society in which they operate." Professor Spalding

quotes this remark, apparently to indicate his disagreement with it. He asks me for citation of authority. Unfortunately, the question of appropriate method, unlike the question of "what the legal rule is," cannot be answered by citation. It must instead be answered by every scholar as he poses problems and seeks to solve them. In trying to understand legal phenomena in Kenya and the United States, I have examined such phenomena in conjunction with other social institutions, sought illumination from comparative material, and drawn upon the theories of social science.[1] I believe that Professor Spalding's book - a good one - would have been better had he done the same.

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1. "A Comparative Theory of Dispute Institutions in Society," 8(2) Law and Society Review (Winter 1974) (forthcoming); "Law Books and Books About Law," 26 Stanford Law Review 175 (1973); "Case Method Research in the Customary Laws of Wrongs in Kenya - Part I: Individual Case Analysis; Part II: Statistical Analysis," V(4) East African Law Journal 247 (1969), VI(1) East African Law Journal 20 (1970) (an abridged version appears in 17 American Journal of Comparative Law 573 (1969)).

BOOK REVIEW

PUBLIC LAW AND POLITICAL CHANGE IN KENYA: a study of the legal framework of government from colonial times to the present. *By Y. P. Ghai and J. P. W. B. McAuslan*

Nairobi: Oxford University Press, 1970, xxviii + 536 pp.

There can be no doubt that this is one of the best studies of the role of public law in an African nation. The authors' research has been comprehensive, their analysis is careful and perceptive, and their criticism is deeply felt and responsible. Because it is obviously impossible to offer a detailed review of more than five hundred densely written pages, I will instead try to measure the book against the above three criteria, which the authors, in the preface, have adopted as their own.

The explicit justification for this volume is to supply useful information not otherwise available: "no book on the policies and government of an independent Kenya written by political scientists or historians was, so far as we could discover, in the offing, and this seemed to be a gap which it was worth trying to fill . . . ."[1] The authors have succeeded abundantly. They exploit legislation, parliamentary debates, reports and High Court cases with great sophistication to inquire into aspects of public law which have thus far been neglected, for instance: the East African Community (clearly an essential counterpart to any national study); the legal profession (frequently ignored by more parochial treatments); and human rights, sometimes skirted as too delicate an issue. The events of the past seven years are skillfully related to the colonial background, drawn from such specialized studies as Oliver and Mathew[2] and Mungeam[3] on history; Arthur Phillips' superb report on the judicial system;[4] and Sorrenson's recent, detailed examination of land administration.[5] This juxtaposition permits the book to demonstrate the inevitable continuities in institutions and practices which straddled the barrier of independence, despite the rhetoric of change.

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1. p.v. This expectation is not wholly credible, since Cherry Gertzel, whose help the authors acknowledge, published her book, *The Politics of Independent Kenya, 1963-1968* the same year. I offer a brief comparison of the two books below.
2. *History of East Africa*, vol. I. Oxford: Clarendon Press, 1963.
3. *British Rule in Kenya, 1895-1912*. Oxford: Clarendon Press 1966.
4. *Report on Native Tribunals*. Nairobi: Government Printer, 1945.
5. *Land Reform in the Kikuyu Country*. Nairobi: Oxford Univ. P., 1967.

Secondly, Ghai and McAuslan claim to offer a new approach to the tired subject of constitutional law. They believe:

> "that legal scholarship and public lawyers have much to contribute to these topics, but that this will never appear to be the case if we lawyers continue to produce formal analyses of legal texts, which, like so much modern packaged food has been processed and packaged in a vacuum, and is consequently tasteless. With somewhat less conviction, we would also think that it is a mistake of equal proportions for lawyers, in a desperate effort to prove their relevance to other social scientists in this field, to go overboard for the latest methodology and systems analysis of those social sciences . . . .
>
> What is needed in our view is country by country . . . studies of aspects of public law set in their historical, political and economic context . . . ."[6]

I disagree. The authors' choice of a middle road between doctrinal exegesis and empirical analysis is supported by an unfair picture of the utility of the social sciences for an understanding of law. No one would argue that lawyers should go overboard in a desperate effort to be relevant. But I would assert that a full comprehension of the operation of law in society must be the goal of every legal scholar. And it is precisely this contemporary *social* frame of reference which is sometimes missing in their analysis. The omission was, to me, most glaring in the chapter on the judicial system, which seeks to analyze the operation of the African Courts without discussing a *single* case decided by those courts, or referring to any of the sociological or anthropological literature which might help to illuminate the background against which these courts function. This is an example of the lawyer's perspective at its most myopic. But the authors clearly recognize their failing, for at the end of the section they write: "What is needed is . . . much more empirical research into the operation of the law in Kenya . . . into the extent to which actual practice in the field has been affected, and people's attitudes changed, by modern statutory reforms . . . ."[7] To this I can only add my full agreement.

The outstanding merit of this book, however, lies not in exposition nor analysis, but in its willingness to criticize past and present governmental practices. Ghai and McAuslan are impartially severe on the

6. pp. v-vi.
7. p. 380 fn. 49.

colonial regime and on the politicians of independent Kenya. I find most illuminating their general conclusion that the role of law throughout the history of Kenya has not been, as frequently claimed, the dispensation of justice and the regulation of governmental activity, but that law has rather served to facilitate administration, bowing to the needs of the moment whenever this was found expedient.[8] In their strictures upon recent actions of the government of Kenya, they display a courage which contrasts sharply with that shown by another author, Cherry Gertzel, in her recent book, *The Politics of Independent Kenya 1963-68.*[9] The difference can be seen most clearly by comparing the way in which each book treats the arrest of Bildad Kaggia, then Vice-President of the KPU, for holding a public meeting without a permit, and his subsequent sentence to six months' imprisonment. Ghai and McAuslan note, at the outset, the extent to which the Public Order Act,[10] under which he was charged, has emasculated the right to engage in political activity. "Given the wide discretions vested in administrative and police officers as to the holding and conduct of meetings, very severe limitations can be imposed on the right to meet and discuss. It is common knowledge that permission is consistently denied to the members of the opposition to hold meetings, even just before elections. (fn . . . The Government has prevented the leader of the opposition from talking to the University or schools.)"[11] The authors contend that, despite the breadth of the Act, Kaggia's presence in a KPU sub-branch office, at the invitation of the party, and his fifteen minute talk to the people present, did not necessarily constitute a violation, and quaere whether the court "ought not to have leaned in favour of the accused given the spirit of the Bill of Rights."[12] Finally, they criticize the defence for failing to challenge the validity of the Act: "Any form of prior censorship or approval has an inherent tendency towards denial of freedoms and rights, and it may be questioned whether the requirements in the Act do not infringe these rights under the Constitution."[13] Gertzel's treatment of this incident is rather more summary: "Kaggia was arrested early in 1968 and charged with holding an illegal meeting for which he was imprisoned for six months."

8. This point may be somewhat overstated. The African Court system could not have been entirely an instrument of administration when, in the 1960s, about fifty thousand people a year were voluntarily submitting their grievances to these courts for settlement.
9. Nairobi: East African Publishing House and Heinemann, 1970.
10. cap. 66.
11. p. 449.
12. p. 448.
13. p. 450.

Because I share the doubts expressed by Ghai and McAuslan as to the legality and propriety of this prosecution, I find Gertzel's omissions a form of subtle bias, the more to be deplored because it hides behind a mask of neutral historicism.[14] The ultimate justification for candid criticism found throughout the book is offered by the authors themselves:

> "There are, alas, some countries in which sycophancy is regarded as objective and adverse criticism as sedition; we do not believe Kenya to be such a country, and we would stress that if our judgments are regarded as austere the standards employed are for the most part those set by the leaders of Kenya themselves, and if they are regarded as erroneous they should be seen, not as motivated by ill-will, but as a stimulant to debate on public matters in Kenya."[15]

The publication of this book is itself the strongest evidence that Kenya does not fall within the category of nations who have forfeited their freedom.

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14. Numerous other examples of these different approaches could be given. On the disqualification of KPU candidates in the local government elections of 1968 compare Gertzel p. 166 with Ghai & McAuslan p. 517; on the withdrawal of the passport of Oginga Odinga on the eve of his departure to address a university audience in America, compare Gertzel p. 148 with Ghai & McAuslan p. 417. Gertzel simply fails to discuss many of those incidents most embarrassing for KANU, e.g., the repeated extension and use of the Preservation of Public Security Act, cap. 57 (Ghai & McAuslan p. 434); the detention of Mr. Ooko under that Act (Ghai & McAuslan p. 437 ff.); the dissolution of the Kenya Federation of Labour and the Kenya African Workers' Congress (Ghai & McAuslan pp. 446-47), etc.
15. p. viii.

REPLY TO MAX GLUCKMAN

Max Gluckman pays me the high compliment of devoting a good portion of his recent article (1973) to a re-analysis of my interpretation (1969) of a case drawn from the records of the primary courts of Kenya. And he is extremely flattering in his comments upon that interpretation. A reply would therefore seem unnecessary at the least, and possibly ungrateful. I know I am not the latter, and I hope the reply is not wholly superfluous.

With the distance created by time, I now see my article, Gluckman's criticism, and my reply, as a dialectic. In writing my article, I was reacting to a body of scholarship that was almost totally preoccupied with rules. Although I only quoted at length from the work of Charles Dundas (a colonial administrator), I also cited numerous other examples by both lawyers and anthropologists. And Gluckman, himself, acknowledges that "some lawyers tend to be concerned in Africa to record rules, as the *Restatement of African Law* shows . . ." (1973: 635). I therefore do not agree that it has been "long established and accepted" that "a study of abstract rules is not enough" (1973: 624).

In reacting to this preoccupation with rules, I confess that I went to the other extreme, and gave the impression that I believed "that cases are more important than rules," for which Gluckman has quite rightly criticized me (1973: 634). But I never contended that "the study of the case, or the dispute, or the conflict should be the only focus of the study of law" (1973: 613), nor did I assert "that cases alone will give rules" (1973: 622). Indeed, I could hardly have done so, for, as Gluckman writes, the "analysis by Abel, does not observe the rule (note!) he promulgates" (1973: 613). The reason it does not is that I promulgate no such rule.

If my reaction to earlier scholarship was exaggerated, so, I believe, was Gluckman's reaction to my article. Recognizing that Dundas' work "particularly raises [my] ire," Gluckman attempts to explicate Dundas' report that, in Kikuyu law, "if a man were seized by a lion, and his friend wishing to save him were to throw a spear, he would be liable for compensation if he inadvertently struck the man instead of the lion" (1915: 263-64). Gluckman writes:

> one would like to know if Dundas was told the rule by the elders in reply to his putting an hypothetical case, or whether they were discussing with him the absolute liability of a man of one group for blood-compensation if he kills a member of another group, or whether it cropped up spontaneously from the elders in a discussion of the relationships of groups involved in potential feud as against payment of blood-compensation (1973: 624).

I, too, would like to know this, for I agree with Gluckman that context is vitally important. Gluckman has perceptively suggested some of the possible contexts, each of which would alter the meaning of the rule. Lacking a knowledge of the actual context, I stick to my original contention that such rules are "absurd" (1969: 575). Nor will it do to guess at the context. Gluckman argues "that it must have been a statement in one of these contexts, or a very similar context" (1973: 624), but he offers no evidence for this, and the contexts themselves differ significantly. Alternatively, Gluckman tries to illuminate the rule by describing the context in which another rule — which he views as similar — was employed in a case involving another tribe, the Pokot. This simply will not do. True, the Pokot, like the Kikuyu, live in Kenya; but there the resemblance ends. The Pokot are members of the Nilo-Hamitic linguistic group, pastoralists of the western Rift Valley. The Kikuyu are a Bantu people, agriculturalists on the slopes of Mount Kenya. These differences affect both social structure and culture; nor is there any record of significant contact between them. A case from one cannot illuminate a rule from the other.

Yet despite these quibbles, I arrive at complete agreement with Gluckman's fundamental position, and do so largely by reason of his thoughtful criticism of my earlier article. "We are caught in a circle, in which law, it is true, can only be understood through cases — but cases can be understood only through law, and both have to be set in the matrix of social process" (1973: 622).

Having allowed myself the indulgence of a reply, perhaps

I am in no position to call for an end to controversy. But I find myself applauding the Cheshire Cat's response to Alice:

> "Cheshire Puss," she began, rather timidly . . . . "Would you tell me, please, which way I ought to walk from here?"
>
> "That depends a good deal on where you want to get to," said the Cat.
>
> "I don't much care where," said Alice.
>
> "Then it doesn't matter which way you walk," said the Cat.
>
> "—so long as I get *somewhere,*" Alice added as an explanation.
>
> "Oh, you're sure to do that," said the Cat, "if you only walk long enough!" (Carroll, 1946: 64).

Perhaps we should turn to the question of where we want to get to.

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